TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 40

FRANK M. RIDER, JOHN F. BURGESS, AND SAMUEL M. RUTLEDGE, COMMISSIONERS OF MUSKINGUM COUNTY, OHIO, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED DECEMBER 10, 1897.

(16,745.)

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Judd & Detweiler, Printers, Washington, D. C., June 14, 1898.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and eastern division of the southern district of Ohio, begun and held at the court-rooms, in the city of Columbus, on the first Tuesday of June, being the first day of that month, in the year of our Lord one thousand eight hundred and ninety-seven, and in the one hundred and twenty-first year of the Independence of the United States of America—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
vs.
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE.

Be it remembered that heretofore, to wit, on the 21st day of November, A. D. 1891, there was filed in the clerk's office of the court aforesaid a certain transcript from United States Commissioner N. S. Chandler, a commissioner for the southern district of Ohio; which said transcript is clothed in the words and figures following, to wit:

Transcript of Proceedings.

Transcript from criminal docket of United States circuit court commissioner.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

No. 1.

UNITED STATES OF AMERICA
vs.
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, Defendants.

Before me, Norwood S. Chandler, a commissioner of the circuit court of the United States within and for said district, complaint and affidavit was made on this 27th day of October, 1891, by Col. William E. Merril-, charging that, in substance, on or about the 15th day of October, 1891, at Zanesville, in said district, the defendants, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, being then and there the duly constituted and acting board of county commissioners of the county of Muskingum and the State
2 of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25th, 1891, been notified, in writing, by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of such

waters on account of not being provided with a draw-span below the now United States lock No. 9, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration, so as to render navigation under said bridge reasonably free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the Secretary of War to remove said obstruction to the navigation and to make the alterations specified in said notice and above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 18th, 1890, in such case made and provided. On October 27th, 1891, issued warrant to John Drake, deputy U. S. marshal, returnable on October 29th, 1891. Warrant returned indorsed in substance as follows:

"Received this writ on the 27th day of October, 1891, and on the 28th day of October, 1891, I arrested the within-named Frank M. Rider and John F. Burgess and took them before the court, and on the 29th day of October, 1891, I arrested the within-named Samuel M. Rutledge and have his body now in court. John H. Drake, deputy U. S. marshal."

On October 27th, 1891, I admitted Frank M. Rider and John F. Burgess to bail in the sum of $1,000.00 each for his appearance before me on October 31, 1891, at 9 o'clock a. m., upon the recognizance of S. M. Winn and Frank H. Southard. On October
3 29th, 1891, I admitted Samuel M. Rutledge to bail for his appearance before me at the same time on the recognizance of the same parties. On October 31, 1891, defendants came before me, the said commissioner, at my office, in the city of Zanesville, in said district, and waived the reading and explanation of the complaint and entered a plea of not guilty to the charge made in the complaint; and thereupon, in preliminary trial to determine whether there exists probable ground to believe said defendants were guilty as charged, the following witnesses were sworn and examined on the part of the plaintiff: Col. William R. Merrill, Lieut. Guillette, and C. E. Mosier; and thereupon the United States rested; and thereupon the defendants, by their attorney, S. M. Winn, demurred to the evidence; which demurrer was overruled; to which overruling of said demurrer the defendants then and there excepted, and, the defendants desiring to offer no evidence in their own behalf, the case was submitted, and, after hearing the arguments of counsel for plaintiff and defendants and upon the evidence of the said witnesses, it appearing to me, the commissioner, that the laws of the United States have been violated as charged in the complaint, and that there is probable cause to believe the defendants guilty of the alleged offence, it was ordered that they give bond in the sum of five hundred dollars each for his appearance before the United States district court for the southern district of Ohio, at Columbus, Ohio, to be there held on the first Monday in December, 1891, to answer said charge, and that in default of same they stand com-

mitted; and thereupon the defendants gave bond in the sum of five hundred dollars each for his appearance at said time and place, and, the United States district attorney consenting, John F. Burgess was taken as surety for F. M. Rider and Samuel M. Rutledge and F. M. Rider *and* surety for John F. Burgess.

UNITED STATES OF AMERICA, }
Southern District of Ohio, } *sct:*

I, Norwood S. Chandler, a commissioner of the circuit court for the southern district of Ohio, do hereby certify that the fore-
4 going writing is a true transcript of the proceedings had before me in the cause therein named, and that copies of the process and the examination and recognizances in said cause are herewith returned into the circuit court of the United States for the eastern division of the southern district of Ohio in pursuance of law.

In witness whereof I hereunto set my hand, at office, in said district, this 13th day of November, 1891.

NORWOOD S. CHANDLER,
Commissioner of the Circuit Court, as Aforesaid.

Copy of Affidavit.

UNITED STATES OF AMERICA, }
Southern District of Ohio, City of Cincinnati, } *ss:*

Before me, Henry Hooper, a commissioner of the circuit court of the United States for the southern district of Ohio, personally appeared this day Col. William E. Merrill, corps of engineers, U. S. A., who, being first duly sworn, deposes and says that on or about the 15th day of October, A. D. 1891, at Zanesville, in the district aforesaid, Frank M. Rider, John F. Burgess, Samuel M. Rutledge, being the and there the duly constituted and acting board of county commissioners of the county of Muskingum and State of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25, 1891, been notified in writing by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of such waters on account of not being provided with a draw-span below the new United States lock No. 9, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration, so as to render navigation under said bridge reasonably free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the
5 Secretary of War to remove said obstruction to the navigation and make the alteration specified in said notice and

above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 19th, 1890, and in such case made and provided. Vol. 26, U. S. Stat., p. 453.

WM. E. MERRILL.

Sworn to before me and subscribed in my presence this 26th day of October, A. D. 1891.

HENRY HOOPER,

[SEAL.] *Commissioner of the Circuit Court of the United States for the Southern District of Ohio.*

Copy of Warrant.

Warrant.

The President of the United States of America to the marshal of the United States for the southern district of Ohio and to his deputies or any or either of them:

Whereas complaint on oath hath been made out in writing charging that Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, on or about the 15th day of October, in the year one thousand eight hundred and ninety-one, at Zanesville, in said district, being then and there the duly constituted and acting board of county commissioners of the county of Muskingum and the State of Ohio, and who are charged by law with the control, alteration, and repair of bridges in the said county, to wit, the bridge between Taylorsville and Duncan Falls, Ohio, and having heretofore, to wit, on February 25, 1891, been notified in writing by the Secretary of War that the said bridge over the Muskingum river, one of the navigable waterways of the United States, was then and there an unreasonable obstruction to the free navigation of said waters on account of not being provided with a draw-span below the new United States lock number nine, in said river, and requiring the following alterations to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map to said notice attached, and prescribing a reasonable time, to wit, on or before the 30th day of September, 1891, in which to make said alteration so as to render navigation free and easy, did unlawfully, knowingly, and wilfully neglect and refuse to comply with the lawful order of the Secretary of War to remove said obstruction
6 to the navigation and make the alterations specified in said notice and above set forth, contrary to the form of sections 4 and 5 of an act of Congress approved September 19th, 1890, in such case made and provided and against the peace and dignity of the United States of America:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge and bring their bodies forthwith before me to answer the said complaint and be dealt with according to law for the said offense.

Given under my hand and seal this 27th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

NORWOOD S. CHANDLER,
Commissioner of the Circuit Court of the United States for the Southern District of Ohio. [SEAL.]

Approved:
HENRY HOOPER,
Assistant United States Attorney.

7 And afterwards, to wit, on the 23rd day of November, A. D. 1891, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, B. 318.

THE UNITED STATES
vs.
COMMISSIONERS OF MUSKINGUM COUNTY, O. } 211. Information.

On motion of the attorney for the United States, leave is given him to file a criminal information herein forthwith, and the same is according- done.

And afterwards, to wit, on the 23rd day of November, A. D. 1891, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain criminal information in this cause; which said criminal information is clothed in the words and figures following, to wit:

Criminal Information.

United States Circuit Court, Southern District of Ohio, Eastern Division.

At the December term of the circuit court of the United States for the southern district of Ohio, eastern division, in the year of our Lord one thousand eight hundred and ninety-one, leave being first had and obtained, comes John W. Herron, attorney for the United States in said district, and informs the court that, as appears from a complaint on oath and a transcript of proceedings held before one Norman Chandler, a commissioner of this court at Zanesville, and now placed on file herewith, upon the fifteenth day of October, A. D. 1891, the defendants, Frank M. Rider, John F. Burgess, and Samuel F. Rutledge, were then and there the county commissioners in Muskingum county, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals on all State and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncan Falls, Muskingum county, Ohio, and the Secretary of War of the
8 United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navi-

gation of said Muskingum river, one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners, as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio; and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th day of January, 1891, was set and named as the day when such evidence would be heard before Lieut. Col. William E. Merrill, corps of engineers, at the U. S. engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the third day of February, 1891; and afterwards, to wit, on the 25th day of February, 1891, and after said day of hearing, the Secretary of War gave notice in writing to said defendants controlling said bridge, as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw-span below the new U. S. lock No. 9, in said river, and requiring the following change to be made, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891, and that service of said notice, as aforesaid, was made on the 3rd day of March, 1891, by delivering personally a copy thereof to said commissioners at their office in Zanesville, Ohio.

And the said Frank M. Rider, John F. Burgess, and Samuel
9 M. Rutledge, county commissioners of Muskingum county, Ohio, as aforesaid, did unlawfully, on, to wit, the fifteenth day of October, 1891, at the place aforesaid and after receiving notice to that effect, as hereinbefore required, from the Secretary of War and within the time prescribed by him, wilfully fail*ed* and refuse*d* to comply with the said order of the Secretary of War and to make the alterations set forth in said notice, contrary to the form of sections 4 and 5 of an act of Congress approved September 18th, 1890, in such case made and provided and against the peace and dignity of the United States of America.

JOHN W. HERRON,
U. S. Attorney, S. D. O.

And afterwards, to wit, on the 11th day of December, A. D. 1891, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, B. 329.

United States Circuit Court, Southern District of Ohio, Eastern Division, *ss:*

THE UNITED STATES OF AMERICA
vs.
THE COMMISSIONERS OF MUSKINGUM, CO., O. } No. 211.

This day came the parties, by their attorneys, and said defendants being present in court, thereupon a jury, being called, came, to wit, Lee Atherton, John C. Butler, Franklin Burlingame, J. D. Coles, George Johnston, William H. McBride, E. A. Peters, Adam Quick, John Rogers, George Seall, Albert Wright, and Joseph H. Geiger, who were duly empaneled and sworn well and truly to try the issues joined, and, having heard the testimony and the charge of the court, upon their oaths do find said defendants guilty in manner and form as charged in said information; whereupon counsel for defendants gave notice of motion for new trial.

And afterwards, to wit, on the 22nd day of December, A. D. 1891, came the defendants, by their counsel, and filed in the clerk's office of said court their certain motion for new trial in this cause; which said motion for new trial is clothed in the words and figures following, to wit:

Motion for New Trial.

10 United States District and Circuit Court, Southern District.

UNITED STATES, Plaintiff,
vs.
FRANK M. RIDER, JOHN F. BURGESS, & SAMUEL M. RUTLEDGE, Commissioners of Muskingum County, Defendants.

Motion for new trial.

Now comes the defendants and moves the court for a new trial in this cause for the following reasons, to wit: 1st, because the verdict is against the evidence and the law; 2nd, because the verdict is contrary to law; 3rd, because the verdict is not supported by the law; 4th, the court erred in charging the jury, and, 5th, for other errors apparent upon the record.

F. H. SOUTHARD &
S. M. WINN,
Att'ys for Def'ts.

And afterwards, to wit, on the 22nd day of January, A. D. 1892, there was filed in the clerk's office of said court certain testimony in this cause; which said testimony is clothed in the words and figures following, to wit:

Testimony.

Circuit Court of the United States, Eastern Division, Southern District of Ohio.

UNITED STATES OF AMERICA, Complainant, *vs.* FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. Rutledge, County Commissioners of Muskingum County, Ohio.	No. 211.

Be it remembered that on the trial of this cause at the December term, 1891, of the circuit court of the United States in and for the eastern division, southern district, of Ohio, at Columbus, Ohio, before the Honorable George R. Sage and a jury, the complainant, to maintain the issue on its part, offered in evidence the following testimony, to wit:

WILLIAM E. MERRILL, being first duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. Give your full name, Colonel.

A. William E. Merrill.

Q. What is your profession?

A. United States engineer, in charge of the Muskingum and other rivers.

Q. How long have you had charge of these rivers?

A. I have had charge of the Muskingum since the Government took possession, in 1887. I have had charge of the others since 1870.

Q. Have you had charge of the improvements being made
11 at Taylorsville?

A. I have had general charge.

Q. Just state in as short manner as possible the general character of the improvements there.

A. The work that has been recently done by the United States has been to build a lock in the west end of the dam at Taylorsville, and to raise the dam at Eagleport to bring the water up there so that navigation could be had through the main river.

Q. What was the means used here prior to the time when the Government took possession?

A. This dam was passed by means of a lateral canal with a lock at the lower end.

Q. Now, where was the bridge at that time?

A. At that time there were really two bridges, although you might consider them as connected.

Q. The fixed bridge over the river I am asking about.

A. There is the fixed bridge over the river and a swing-bridge over the canal.

Q. How far has the work on that improvement progressed?

A. You mean the work of the Government?

Q. Yes, sir.

A. The lock is finished, except the lower gates had not been put in the last time I knew of the work. There was no use to put them in until it could be utilized for navigation. It has been substantially finished for over a year.

Q. How has the dam been kept up?

A. It was built by the State, and we found it there and repaired it from time to time, keeping it in its original condition as to height.

Q. Where is the channel proposed to be built by the Government?

A. The Government proposes to let boats pass up and down the main river. Of course, when you get to the lock you go in towards the shore a short distance; below the lock boats will follow the middle of the river.

Q. I will ask you to state whether that improvement is beneficial to navigation at that point of the Muskingum river or not.

12 A. I have considered it of vital importance to successful commerce. It is impossible to keep the canal in condition for navigation, and the difficulty is increased since the building of the railroad and the removal of the gravel and sand has been going on. The digging of the sand from the side of the banks—some of it is brought to Columbus—brings large amounts of sand and gravel into the canal, until it is almost impossible to keep it navigable.

Q. Then you think this change must be made?

A. I do. I might add that I made a special report on that subject——

(Witness stopped by objection of counsel for defendants.)

Q. Now, where is the bridge with reference to this channel through which commerce will pass in the Muskingum river—the fixed bridge which is the obstruction to commerce of which we complain?

A. A very short distance below the lock, probably 150 feet, so that boats cannot go out of the lock without passing under it, and there being no draw, navigation by boats of any size is cut off.

Q. How high is the bridge above the water?

A. I don't recollect, but not what we would call a high bridge.

Q. Would it be possible for a steamboat to pass under that bridge?

A. A very small steamboat might, but the ordinary passenger packet of the Muskingum river could not pass at any stage without the lowering of the chimney. The Lizzie Castle could not probably get her pilot-house under at low water, and at ordinary stage of the water it would be quite impossible for a boat of any size to get under at all.

Q. I will ask you what correspondence you have had, if any, with the commissioners of Muskingum county in reference to this subject.

(And thereupon it was agreed that the entire correspondence between the parties above mentioned should be admitted in evidence, and the same are marked "Exhibit A" and made a part hereof.)

Q. Have you examined that blue print (handing witness print), which is plat of the improvements suggested?

13 A. Yes, sir; I examined it when it passed through my office.

Q. Was it made under your supervision?

A. The original drawing was, and I think that particular blue print, but blue prints are all fac-similes and there is no way of telling.

(And thereupon the blue print above shown witness was admitted in evidence, marked "Exhibit B," and made a part hereof.)

Q. I will ask you to state whether that plan furnished to the county commissioners of Muskingum county would render navigation of the Muskingum river possible at that point under the bridge.

A. It would.

Q. What length of time was given under that notice to the county commissioners of Muskingum county to make the change?

A. I think to the 30th of September.

Q. Was that a reasonable time for this change to be made?

A. It was, in my judgment.

Cross-examination.

By Mr. WINN:

Q. Where this new lock is that you have put in there, I will ask you to state whether or not navigation would be possible at that place in the Muskingum river, even with your locks and dams.

A. I don't know that I understand your question. Navigation would of course be possible, but that do-sn't seem to be quite what you want——

Q. Where is the channel of the river with reference to where you have placed this new lock and cut this channel?

A. Why, the deepest part of the natural river is about the middle of the river, as I recollect it, but you can't put a lock in the middle of the river. It must be on one side or the other.

Q. Now, then, if the change were made in this bridge as you request, then would the natural navigation of the river still be obstructed by the bridge?

A. I don't understand that question. Please repeat that.

Q. You understand what I mean when I say "natural navigation"?

14 A. I know what I understand—the river in a state of nature.

Q. Without locks or dams?

A. I understand that.

Q. If the change is made in the bridge that you have asked, still wouldn't it be an obstruction to navigation in the natural channel?

A. I- a state of nature; there is no natural navigation there and there hasn't been within my memory. For forty years the navigation has been entirely artificial.

Q. Suppose that these locks and dams were taken out of this river, then what navigation would there be at Duncan's Falls and Taylorsville?

A. Then navigation would not be very good and would be impossible in low water. Navigation would be limited to the medium and high stages. At least, that is my judgment. The conditions don't exist to give a positive answer, but from my knowledge of rivers would say that the river would not be navigable except by a very light craft, and navigation at any rate would be limited to the medium and high stages.

Q. Then, as I understand you, Colonel, you have no knowledge and give no estimate as to what the condition of the river would be in a state of nature?

A. I can only give my general estimate from being familiar with the western rivers, but the facts do not exist and have not existed for nearly fifty years.

Q. When did you first take control of the Muskingum river?

A. In 1887.

Q. At that time what means of navigation was provided at Taylorsville? A. There was a lateral canal, with a lock at the lower end to enable boats to pass Taylorsville dam.

Q. Now, Mr. Merrill, as you know the river, I will ask you to state whether in this river the natural channel would be navigable by steamboats in a state of nature, or as near as you can tell.

A. If by that question you mean would it be continuously navigable in all stages, I would say no; but if whether navigable in good and medium stages I would answer yes.

Q. With what kind of a boat would it be navigable?

15 A. That would be merely a matter of guessing, but probably two hundred tons.

Q. How as to propelling power?

A. Steam.

Q. Well, as to great or small?

A. I can't answer that. Boats can go up very still currents with ordinary propelling power with probably a little assistance from capstans, but they get up very slowly. The question of propelling power is rather a question of speed. Boats are frequently carried up through rapids which they cannot navigate by steam by being pulled through with steam capstans. That is the case to this day on the Tennessee river.

Q. Tell us what is the fall of the river at this place where this bridge is located per mile.

A. No, sir. That condition don't now exist, and our records are mainly limited to vertical falls created by our dams, and I don't know what is was before the dams were built.

Q. What is your judgment as to what the fall would be?

A. I never had occasion to study that. That would be a question of fact which I don't know. I have no opinion as to what the

fall is there at all. All I could do would — simply to make a guess.

Q. Let us have your guess.

A. I don't think it would be of any value. I prefer not to give it, as I have no data.

Q. I will ask you to state whether it would be as much as eight feet to the mile, in your judgment.

Q. I have no information whatever of the bed of the river above Taylorsville dam. It has been drowned out by the dam, and it is impossible for me to tell the fall below the lock. It would certainly not be that much in what is left of the open river.

Q. Well, if you can give us any judgment as to the fall there, I would be glad to have it.

A. The lift of the lock in low water is about eleven feet. If I had known that you wished that, that you expected to ask such a question, I could have given it to you exactly. We have all those data, but I don't carry them in my head.

Q. Can you give it approximately?

16 A. I did give it approximately as about eleven feet.

Q. I will ask you what you have done in this locality with reference to opening a channel for commerce.

A. I built a lock.

Q. Nothing more?

A. I have cleared out the approach below the lock to deepen the water.

Q. What lock—what approach?

A. I have deepened the channel for quite a distance below the lock.

Q. For what distance have you deepened the channel or canal?

A. There is no canal there.

Q. The channel?

A. I have deepened the channel in order to get the full benefit of the improvements——

Q. For what distance?

A. I don't recollect.

Q. What is your judgment?

A. It would be a mere guess. I should say twelve hundred feet, maybe.

Q. How have you deepened the channel?

A. By blasting.

Q. Blasting what?

A. The rock in there.

Q. Anything else than blasting the rock?

A. Well, incidental to the blasting of the rock, we removed the loose material to get at the rock.

Q. Below the rock did you do any dredging in the river?

A. No, sir.

Q. Below the rock I mean.

A. You mean downstream?

Q. Yes, sir.

A. We have not. It is probable that we will. We have a dredge-boat, which is used to keep open any channel that is filled up.

Q. Whereabouts in the river is the deepening of this channel made?

A. It has been made from the lower end of the lock at the middle of the river to a point some distance below in Salt creek, where I found a sufficient depth naturally.

Q. Before the raising of the Eagleport dam do you know whether navigation would be possible where you have stopped the deepening of the channel without that raising of the dam?

A. Certainly, but not in dead low water.

17 Q. Where is the deepening of this channel located with reference to the west shore of the river?

A. It follows the west shore for a short distance below the lock; then it gradually turns out to the middle of the river.

Q. I will ask you to state what is the course of the river at this point.

A. North and south, about—rather, it runs south.

Q. Now, taking the river from where the dam is located to where you strike the channel, I will ask you to state whether it is a straight channel or whether it is curved and which way.

A. The deepening below the lock follows the axis of the lock for a distance, probably three hundred feet, then curves gradually out to the middle of the river.

Q. I am asking you the course of the river itself, whether or not the river runs straight or is curved.

A. That depends on the piece of the river you take. About a mile, I should think, if you count the river above the dam; if you count above the dam, probably two miles of the river is straight.

Q. After the straight river, which way does it curve?

A. To the west.

Q. When you assumed control of the river, I will ask you to state how navigation was carried on at this point.

A. It was carried on through the canal.

Q. Was the bridge as now located any obstruction to that navigation?

A. It was quite an obstruction.

Q. To navigation through the canal?

A. Yes, sir.

Q. How?

A. It was badly built and very narrow.

Q. Which do you mean, the bridge or the canal?

A. The canal.

Q. I asked you about the bridge. I will ask you whether or not the bridge, as located when you assumed control of the river, was an obstruction to navigation where it was carried on at that time.

A. I understand that you now mean the fixed bridge over the main river—it was not. If you considered it all one bridge, the fixed bridge was not; if you considered them separate, the

18 fixed bridge was not.

Q. Where is navigation carried on now, by Taylorsville?

A. Navigation now is carried on through the canal; the boats cannot get under the bridge in controversy herein.

Redirect examination.

By Mr. HERRON:

Q. I will ask you whether this state of things which exists about the high and low water don't exist in the Ohio river. Take the falls at Louisville. I will ask you whether it is possible there to navigate it except as high water, except through artificial channels.

(Question objected to by counsel for defendants.)

Q. How long has the Ohio river been navigated by boats of different kinds?

A. That is a question of history. I should say from the settlement of the country.

Q. How far within your knowledge?

A. I have known that river to be actually navigated from 1870, when I first took charge of the Ohio river.

Q. It was then navigated?

A. Then actually navigated. I saw the boats at Marietta.

Q. And always by means of these side-out canals?

A. No, sir; half of the dams have no canals.

Q. But what navigation went from Zanesville down had to go by the side-out canal?

A. It had to pass Taylorsville, but there were no canals at quite a number.

Q. It had to pass through this canal?

A. Yes, sir.

And also C. E. GILLETTE, called on behalf of complainant, being first duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. What is your position?

A. First lieutenant of the Engineers of the United States Army.

19 Q. What have you to do with the Muskingum River improvement?

A. In charge as assistant to Colonel Merrill.

Q. For how long?

A. Since 1888.

Q. Do you know of this improvement at Taylorsville?

A. Yes, sir.

Q. I will ask you if you know the bridge that crosses there.

A. Yes, sir.

Q. What improvements have been made there by the Government?

A. A lock practically completed. The channel approach from below has been opened out by removing the rock and the founda-

tions of an old mill, which was one of the main obstructions to the channel; a mill built out in the river, as I understand it.

Q. What is the improved course that the Government proposes to take as to navigation through Taylorsville at that point?

A. Navigation is to come up the main river and the canal is to be abandoned and the lock at the lower end is to be abandoned and removed to give the river at that point the natural width, which is very much contracted by the old lock.

Q. That is to be closed and navigation to go through the main channel of the river?

A. Yes, sir.

Q. How far have these improvements progressed?

A. The lock has been completed, except the lower gates and unimportant matters, and the removal of the rock is entirely completed.

Q. Well, now, the bridge as it is there now, what obstruction, if any, is it to navigation of the river, Lieutenant?

A. It is a perfect obstruction; complete bar to the navigation of the river.

Q. Has any movement been taken by the defendants towards removing the obstruction?

A. None that I have seen, and they have said that they would not remove it.

Q. Where is the proposed channel or navigation with reference to the body of the channel of the river?

A. The proposed channel follows the right bank for a short distance, then turns to the left and crosses the river. The excavation extends to the middle of the river.

20 Q. It goes south on the west side; then crosses to the other side?

A. Yes, sir.

Q. Which way does the body of the water run?

A. The body of the water runs near the middle of the river. The deepest cross-section of the river under the bridge would show the water a trifle deeper where our channel is made, although the body of water don't run there; but immediately under the br*dige* the water is a trifle deeper where we made the channel.

Q. Do you know what the fall of the river is at that point?

A. The fall of the river at low water I had measured last summer, when the dam below was broken, so I know the fall down below. The fall from the surface of the water immediately below the dam at the site of the old lock was two and eight-tenths feet.

Q. What distance?

A. A little more than a mile.

Q. That is the entire fall at that point from below the dam to where the old lock is?

A. Yes, sir.

Q. And was the natural surface of the water between these two points at that time?

A. Yes, sir; the fall was slightly increases, if anything, on account

of the cofferdam. I should say the fall I measured was less than the natural fall of the river.

Q. How much?

A. Three or four inches.

Q. Not more?

A. No, sir.

Q. I will ask you whether you have examined these plans for improvement.

A. Yes, sir.

Q. I will ask you whether those would make navigation possible there and convenient.

A. Yes, sir; it would.

Q. I will ask whether the length of time prescribed in the notice was a reasonable time for the making of the changes prescribed by the plan.

A. It was.

Cross-examination.

By Mr. SOUTHARD:

Q. As I understand you, the lock that the Government has constructed is in the west side of the dam?

21 A. The southwest end; yes, sir.

Q. This dam is across the main channel of the river at that point?

A. Yes, sir.

Q. Where is this bridge in question located, with reference to that dam?

A. At about 150 feet below and nearly parallel to it.

Q. For what distance does the channel that you have deepened below the locks follow the western shore of the river?

A. About 300 feet.

Q. Then it is deflected toward the center, I understand you?

A. Yes, sir.

Q. What is the width of the channel that the Government has deepened?

A. About forty feet at the lock and widens to about 125 feet at the lower end. It has been completed—the removal of the rock has.

Q. To what depth has the Government increased the water?

A. The depth in the channel at dead low water will be about six feet and a half—that is, the minimum.

Q. How much has the improvement deepened the natural?

A. Immediately under the bridge I think we took out about three feet and a half of rock, on the average.

Q. Below, how much?

A. It runs from that to nothing.

Q. The main channel of the river is on the opposite side of the river, is it not, Lieutenant?

A. Above the bridge the main channel is on the other side south. Our channel cuts across and joins that.

Q. What is the width of the river at that point immediately below the bridge?

A. Between seven and eight hundred feet; I don't remember exactly.

Q. Do I understand you that the fall from the dam a mile south is only a fraction over two feet?

A. Nearly three feet, the fall that we measured.

Q. As a part of the means for facilitating navigation at the point named, the Government has raised the dam, I believe, at some
22 point south?

A. At Eagleport.

Q. How much?

A. About four feet.

Q. Giving four feet additional water on the level above?

A. On part of the level. At the site of the bridge it gives not much over a foot.

Q. When the Government took possession of this river how was navigation accommodated at Taylorsville?

A. Navigation went through the side canal.

Q. It does still?

A. Yes, sir.

Q. This side canal extends from the dam above the bridge to a point south and empties into the river, I believe?

A. Yes, sir.

Q. What is the distance of the side canal?

A. About a hundred feet more than a mile.

Q. What do you know of the depth of water in the Muskingum river below this bridge in time of low water?

A. It is quite variable.

Q. Well, that does not answer my question, I submit.

A. Where do you mean?

Q. Below the bridge.

A. Under the bridge there was, I should think, from three to five feet; that would be in the deepest places. Down a few hundred yards below, two feet; it would be nearer two.

Q. At low-water mark?

A. Yes, sir; the dam, like all dams, washes out the material immediately below it and banks it up a distance below, so there is kind of a basin there.

Q. I am not asking for any particular point, but take that river below the dam, from the eastern to the western shore, what would be the average depth of water from shore to shore at low water?

A. How far below the dam?

Q. Take a distance of two miles.

A. Take a point below the dam for six hundred feet, the first hundred feet below the dam the depth would average five or six feet, the next hundred feet further would be five feet, the next hundred feet further, three and a half, and the sixth hundred
23 feet the average depth of water at low water would be about a foot, with gravel bottom.

Q. The river would be at low water narrowed to what breadth?

A. Not over 150 feet.

Q. And within that breadth what at the shallowest point would be the average depth?

A. I think at low water it would average a foot—about that.

Q. The shore from the west to the east is shelving, is it now?

A. I don't understand the question.

Q. The shore of the river is shelving—dips towards the east?

A. Yes, sir; it dips towards the deepest part of the channel.

Q. After the dam was constructed across the main channel of the river, I understand you, navigation has been continuously by the side-cut canal?

A. Yes, sir; when not interrupted by the canal being too full of mud for boats to get through.

Q. Do you know when the notice was served upon the county commissioners by the Government to remove the obstruction in question?

A. I don't remember the date; it was along in December or January.

Q. You personally don't know when it was served?

A. No, sir; approximately six months before September 30th last, as I remember it.

Q. Well, when you answer that that was a reasonable notice to the board of commissioners, what did you take into consideration, Mr. Gillette?

A. The removal of the obstruction. I think, however, that the commissioners could have removed the old span of the bridge, built a new pier, and put a new draw in operation readily in that time.

Q. Did you take into consideration whether the board was possessed of funds with which to make such improvement?

A. That is something I knew nothing about. From previous cases, however——

Q. I am not asking about previous cases.

Redirect examination.

24 By Mr. HERRON:

Q. You know the plans?

A. Yes, sir.

(Counsel for complainant reads act of Congress authorizing this change, found in volume 5, page 217, of Acts of Congress.)

Q. Do you know whether that lock was being built according to the report which was made about that lock?

A. Yes, sir.

Q. It was made by Colonel Merrill to the War Department?

A. Yes, sir.

Q. Did you see that report?

A. I saw the printed copy.

Q. The lock is being built according to that report?

A. Yes, sir.

Recross-examination.

By Mr. SOUTHARD:

Q. When you answered that the time to the 30th of September was a reasonable time for the board of commissioners to make this improvement, did you take into consideration the question as to whether any legislative act was necessary to enable the board to make this improvement?

A. I did not.

Q. Or whether the board had any funds which could be legally expended for such purpose?

A. I knew nothing about that.

And also EDMUND MOSER, called on behalf of complainant, being duly sworn, testified as follows:

Examined by Mr. HERRON:

Q. What is your occupation?

A. Civil engineer.

Q. What had you to do with drawing the plans for the change to be made at Taylorsville?

A. I was instructed—ordered to draw them by Colonel Merrill.

Q. Did you draw the plans?

A. Yes, sir.

Q. The plans contained in that blue print were drawn by you?

A. Yes, sir.

Q. Prepared by you under orders of Colonel Merrill?

A. Yes, sir.

25 Q. I will ask you whether those plans are proper plans for the change at Taylorsville to make navigation better at that point.

A. They are.

Cross-examination.

By Mr. SOUTHARD:

Q. Are you familiar with the situation of matters at Taylorsville?

A. Yes, sir.

Q. Have you a knowledge of the amount of commerce upon the river?

A. At present?

Q. Yes, sir; or for years past.

A. Only what I have seen from Colonel Merrill's report.

Q. You, personally, don't know from actual observation?

A. No, sir.

Q. Commerce upon the river is now conducted by means of the side-cut canal?

A. Yes, sir.

Q. The improvement that the Government has undertaken is to provide a new channel for commerce and the abandonment of the side-cut canal, I believe?

A. It is.

And thereupon it is agreed that any of the surveys in possession of Colonel Merrill may be referred to on motion for new trial, if desired, by counsel on either side.

And thereupon complainant rested.

26 And thereupon the defendants, to maintain the issue on their part, offered in evidence the following testimony, to wit:

And thereupon it is agreed between counsel that the bridge was constructed in accordance with the provisions of the act of the Ohio legislature, to be found in volume 67 of Ohio Laws, at page 127, and that the plans and specifications for the construction of the bridge were approved by the board of public works under date September 2, 1874; approval found in volume 8, page 222, in Records of the Board of Public Works of the State of Ohio, which may be referred to by counsel upon either side upon motion for new trial.

And thereupon it is further agreed between counsel that under the authority of an act of the General Assembly of Ohio, dated March 9, 1836, the authorities of the State, between 1836 and 1840, constructed a series of locks and dams on the Muskingum river between Marietta and Zanesville, including the dam at Taylorsville and a side-cut canal, and has mentioned the same until the passage of the act of legislature, March, 1887, found in volume 84 of Ohio Laws, page —, and the acceptance by Congress. See the act of August 5, 1886, volume 24, U. S. Statutes, at page 324. Either party may refer to the act of the Ohio legislature passed on the second day of May, 1885, Ohio Laws, volume 82, page —.

It is also agreed that all other acts of Congress or by the Ohio legislature in reference to this matter shall be considered in evidence and may be referred to by either party upon motion for a new trial.

It is further stipulated that the side-cut canal at Taylorsville is and has been spanned by a draw constructed under the authority of the State by the commissioners and in accordance with plans approved by the board of public works; all of this before the transfer of the jurisdiction of the river to the United States.

27 And also HARVEY DARLINGTON, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. SOUTHARD:

Q. Your name is Harvey Darlington, I believe?
A. I believe so.
Q. What is your age, Captain?
A. Eighty-odd; eighty-two, nearly.
Q. How long have you known the Muskingum river?
A. 64 years last July.
Q. What connection, if any, at any time have you had with the river?
A. I held steamboat interest twenty some year; sometimes one, sometimes two.

Q. You have navigated the river?

A. Yes, sir.

Q. You knew the river before you navigated it?

A. Yes, sir; my father moved on the river in '28, when he came to Ohio, and it has been my home ever since.

Q. There is now across the river, between Taylorsville and Duncan's falls, a dam spanning the entire river, I believe?

A. Yes, sir; has been for years.

Q. Did you know the river before the building of the dam?

A. Yes, sir; waded it many a time at the falls.

Q. I wish you would describe the condition of that river before the building of the dam in question at the point we are speaking of?

A. How's that?

Q. I wish you would describe that river as it existed below the dam before the improvement of the river.

A. Well, sir, at high water—you understand it took very high water—all flour and such trades as we had was run out by flat boats to Orleans, but that only happened once or twice a year. Along in the spring of the year an occasional canal-boat came up, some salt boats boated up, and flats, but no navigation to depend on at all. This was in case of a rise in the river, sir.

28 Q. How was the river at that point generally? Describe the channel of the river in low water.

A. There was no navigation at all.

Q. Describe what the nature of the channel and the volume of the water was.

A. It was a very stiff current over rocks, a ledge of rocks, and considerable of a fall. I don't know how much fall, only as I heard it talked about. I never seen it measured.

Q. What was the width of the channel at low-water mark?

A. Quite narrow.

Q. What could you put it in feet? How much in feet?

A. Only guessing at it. The channel run between a pair of large rocks in the river. Here was one and there was the other. Whenever a boat was coming up and got into that place it was apt to pull through, and if it couldn't catch that it couldn't get through at all.

Q. What is the width of the rocks?

A. I disremember. Perhaps thirty or forty feet wide.

Q. And what depth of water below the dam in low water, the average depth at the foot of the falls?

A. Anywhere along above Salt creek——

Q. No; down below the dam?

A. Oh, well, in low water—it is pretty hard to tell. I rode it many a time. It wouldn't be more than knee deep to a horse in the channel. I lived there and rode over it, and it wouldn't be more than knee deep to a horse.

Q. Before the bridge was built, was there a public road across at that point?

A. A ferry?

Q. No; people crossing it, crossing the river on horseback and in wagons.

A. Yes, sir; it was a ferry landing for years.

Q. I am not asking about a ferry; I am asking about a ford across there.

A. It was forded there; people went over, ferrying.

Q. Did they go over on a ferry or without?

A. How?

Q. How did they cross the river?

A. Why, just rode a horse, drive a yoke of cattle across, or
29 go across in a buggy—general fording.

Q. When were the first steamboats upon this river?

A. Well, I can tell you the first one from hearsay, not from my knowledge.

Q. Well, go on.

A. The steamboat Putnam was the first boat that steamed the Muskingum river, I suppose, from hearsay. It run there after grain at very high stage of water. It was before my day in Ohio; I only know what they tell me. After that, there was a little boat, quite a small boat, built below the brewery by Captain Boyd. She mayble made a trip or two there over the falls. That was about all—very little.

Q. When did steamboating upon the river commence in your recollection?

A. When the board of public works finished the river. Boats were ready to take the trade as soon as it was done, and so continued until within six or seven years; the trade gave out.

Q. Now, Captain, how was the navigation accommodated by the side-cut canal?

A. Couldn't have made it at all without the canal.

Q. There wouldn't have been any navigation if it hadn't been for the canal?

A. Yes, sir.

Q. Well, after the canal was constructed and the locks and dam at Taylorsville, how was the navigation accommodated?

A. Why, we got through sometimes very easy; when the canal would be clean dredged out, it was very pretty getting through. If in the late fall and filled up from the banks we would have to pull through upon what we call "nigger" on the steamboat.

Q. There were no other means of carrying on commerce except by the side-cut canal?

A. No, sir.

Q. The commerce of the river sprung up after the completion of this improvement for slack-water navigation?

A. Entirely. There was no depending upon anything before; people didn't freight on it before, to make a business of it at all, but after that there was a fair business for a good while.

30 Cross-examination.

By Mr. HERRON:

Q. I understand this canal as used while the State had charge of the works was very difficult to get through?

A. Yes, sir; couldn't get through without it.
Q. It filled up so that navigation was obstructed very much?
A. At times, by the filling washing in.
Q. You said that without that canal navigation was impossible?
A. Would have had no navigation.
Q. If the improvements being made by the Government now to the channel are completed, will that make navigation possible?
A. I ain't been there since it is being improved.
Q. You don't know the change only by hearsay?
A. Yes, sir.
Q. You understand that the Government proposes to——
A. I understand they propose to throw away the canal and make navigation over the falls.
Q. If they succeed in that, navigation would be better?
A. Quicker.
Q. And more sure?
A. If they can get water there, I think it would be.

Redirect examination.

By Mr. SOUTHARD:

Q. Navigation, after the improvement of the river by slack-water navigation, was continuous until within a few years with the trade of the Muskingum?
A. Yes, sir.
Q. Navigation was continuous from the date of the improvement of the river by slack-water navigation until the State surrendered the river, was it not?
A. Of course, navigation was continued until the State went to improving the river. When it couldn't be run with larger boats it was run with smaller boats. If it couldn't be carried at that way, run in flatboats.
Q. The canal at times had to be dredged?
A. All had to be dredged on the river about once or twice
31 a year to keep them good and open so could get through easy.
Q. Now, the bridge is question is between the town of Taylorsville and the town of Duncan's Falls?
A. Yes, sir.
Q. There is a railroad, I believe, upon the west side of the river?
A. Yes, sir; on the bank of the canal.
Q. What amount of commerce is carried on by means of that bridge?
A. I don't think there is much travel; I don't think a great deal, sir. I never thought there would be. I lived there at the time the bridge was built, but I opposed having the bridge.
Q. I am asking the amount of travel.
A. The travel is light, in my opinion; always has been.
Q. How long since you lived there?
A. Well, I think I sold out there in—I forget the year.
Q. Fifteen or sixteen years since you lived there?
A. Yes, sir.

Recross-examination.

By Mr. HERRON:

Q. Did I understand you there was a ferry there?
A. Yes, sir.
Q. To accommodate those crossing?
A. In very low water they could cross without a ferry; in high water they run the ferry.
Q. While the State had charge of the river, wasn't it a fact that in very low and high water that navigation was impossible?
A. In high water it always was impossible; would throw so much water that they couldn't open the locks; would have to lay some time at Marietta; have to stay there sometimes two or three days.
Q. How was it when it was low?
A. Could always lock.
Q. Could always get through?
A. Yes, sir; could always lock, but it would get so low after we locked—so low that we couldn't run the level.

32 P. M. SESSION, *December* 11, 1891.

And also OLIVER DEMSTER, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. WINN:

Q. Give us your name and residence, please.
A. Oliver Dempster.
Q. Where do you live?
A. Taylorsville.
Q. How long have you lived at Taylorsville?
A. A little over sixty years—that is, since I came there close to Taylorsville. It wasn't laid out at that time, 1830.
Q. How long have you known the Muskingum river, Mr. Dempster?
A. Since 1829.
Q. If I understand you, since 1829, probably, you have lived close to Taylorsville and been connected with the Muskingum river?
A. Yes, sir; in sight of Taylorsville.
Q. Do you remember the building of Taylorsville by James Taylor?
A. Yes, sir.
Q. Were you familiar with the river at Duncan's Falls prior to the building of the dam?
A. I was not. A short time prior to the building, in 1830—'29 or '30—the mill was built. I then lived in Morgan county. In '30 I moved into Muskingum county; just moved twelve miles up the river. When I came there there was a brush dam there—made of brush and stone; Taylor had.
Q. Were you familiar with the kind of stream there was there at that time below this brush dam you speak of?

A. Let me explain the brush dam. It did not cross the river; it run up 200 yards or more and turned across; went about two-thirds across the river on the east side. That was the falls.

Q. What was it called?

A. Muskingum falls.

Q. Now, I wish you would state the condition of this river below this dam made by Taylor and probably partly above Taylors-
33 ville, in this shute you speak of, as to navigation in your first knowledge of this river.

A. Well, navigation—so far as navigation was concerned, there was no navigation at all except when there came a rise in the river.

Q. Then what?

A. If it come a hard rain to raise the river, then you might get up or down with a boat—that is, a small boat. There was nothing like steamers come up except a little bit of a steamer, a small steamer. The first steamboat I ever saw at Taylorsville was in 1829, called the McClintock, a stern-wheeler, quite small thing; a little larger than a canal-boat, but not much; but it had to get back while the river was up. I come up on a rise and had to get back on a rise. If she laid at Zanesville till the water went down, she had to lay there until the water would rise again.

Q. Mr. Dempster, I wish you would describe the river below this dam before the State improvement, if you can.

A. Well, from the dam down to below where the locks now stand, where the locks now are, it was falls for about a quarter of a mile then—a ripple.

Q. Go on and describe that fully.

A. There was a ripple there, called Dead Man ripple, that was very swift and with rock bottom, that it was a good deal of trouble to push through. There was once in a while coal-boats came up from Marietta when the water was up. I have helped them through when I was a good chunk of a boy.

Q. How would they get through?

A. By laying what we called the warp; would have four or five men on deck winding on the capstan and four to ten men in the river with capstan bars, lifting, carrying it, and at the same time winding on this line anchored up the river.

Q. Where was the current in that stream—on which side?

A. Well, the most of it was on the east side of the river, on the Duncan's Falls side.

Q. You are familiar with the present location of the lock and channel?

A. Yes, sir.

34 Q. State whether the channel was on that or the other side.

A. On the other side from where they are cutting the channel now.

Q. Now, if you know, Mr. Dempster, I wish you would state the depth of water over this falls, as you call it, before the State improvement—before the building of the dam by the State.

A. Well, that's impossible. As I said before, when there came a

rain—when in low stages of the water—in low water no boats would come through—that is, in what we called dead-low water. In July, August, or September no boats would undertake to go through. In the spring for a couple of months some boats would wind through, as I said, on these little rises when it rained and the river raised.

Q. Have you any impression as to about what the depth of the water was there at low stages?

A. Well, that varied from ten to eighteen inches. I have waded it many a time myself, just with my pants rolled up.

Q. Do you know anything about the building of the dam there by the State?

A. Yes, sir.

Q. When was that done, when begun and when completed, if you know?

A. I can't tell exactly when it was commenced, either in 1836 or '7. It was built by Col. Joseph Sharp, contractor, and the dam was completed in 'forty.

Q. Now, do you know anything about *about* the building or making of the side-cut canal there?

A. Yes, sir.

Q. State when it was done.

A. Commenced that about the same time they commenced the dam, in '36 or '7; I don't know. The canal was finished in 'forty. The first steamboat that ever came up through the canal was on the first day of April, 1841.

Q. Have you been familiar with navigation by means of that side-cut canal since that time?

A. Somewhat; yes.

Q. Now, I wish you would state what navigation was carried on after the construction of that canal—the dam, canal, and locks.

A. Well, steamboats commenced running pretty regularly from Zanesville to Pittsburg.

35 Q. And navigation run through this canal?

A. No other chance; they couldn't get over the dam.

Q. Now, how did navigation compare as to prior to the building of the dam and side-cut canal as to that which took place after its building?

A. You may say there was no navigation until the dam, canal, and locks were put in. As I said before, there was coal-boats went through—small; not as large as canal-boats now. They had to be pushed and towed. As I spoke a while ago, about winding with the capstan and with from six to ten men in the river—six, eight to ten men—just as many as the boat required—and about four usually winding on the capstan, and that was all the navigation was before, except in high water.

Q. After this dam was built and the canal cut, then navigation began by means of steam?

A. Yes, sir.

Q. And commerce was carried on regularly through this canal?

A. Pretty regularly.

Q. And coal-boats abandoned?
A. None been up since as I know.

Cross-examination.

By Mr. HERRON:

Q. There was a dam built there before the State improvements?
A. A dam; yes, sir. Mr. Taylor had a dam and mill.
Q. Was there a lock in that dam for permitting boats to pass through—in the first dam?
A. A brush dam was put in first; then Mr. Taylor put in a lock—put in a frame dame—a little below where the bridge is now located.
Q. Did coal-boats pass up and down—pass through it?
A. Occasionally a coal-boat would go through that lock when they could get up to it.
Q. How often before the improvement by the State in '41 did you see a steamboat go up the Muskingum river at all?
A. I don't recollect of ever but three coming up until after.
Q. What were they?
A. The McClintoc was the first one I ever saw; then an-
36 other called Lady Byron, the largest boat that ever came up until after the locks and sam was put in, but she didn't get no further than Duncan's Falls—had to stop where Mr. Miller's mill now is; used to be a landing at the foot of the falls.
Q. What other one?
A. I can't recollect the name; might have been two or three others. I won't undertake to tell the names of any others; I don't recollect.
Q. Was there much inconvenience in navigation passing through that canal while the State had it?
A. Well, sometimes the canal would fill from washing of the bank and create a bar, but they made out to get through. At the time of a flood the wash has stopped navigation for a couple of days till they cleaned that bar out.
Q. Are you living there now?
A. When I am at home; yes, sir.
Q. Hasn't that bar had to be cleaned out during the present year three or four times?
A. Haven't used the canal this year, since the Government went to work there.
Q. Didn't that bar have to be cleaned out there three or four times a summer?
A. It just depended on how many big rains came. If there was a big rain, it had to be cleaned out; if not, it didn't.
Q. It is a fact that it had to be cleaned out three or four times?
A. Usually, and sometimes not at all, if it didn't come none of those big rains.
Q. How many times has the Government cleaned it out since it has had charge?
A. I don't think but once since the Government had it.

Q. Do you know when the Government took possession, Mr. Dempster?

A. I think two years ago last spring, maybe.

Q. Are you familiar with the location of the bridge across the river at the dam?

A. Yes, sir.

—. Where is that located with reference to the State dam?

A. It's about, perhaps, three hundred feet below the State dam—something like that. It is only guesswork, but I think it is
37 about that; maybe not that far.

Q. Mr. Dempster, have you any opinion as to the effect that floods, as you have termed them, will have upon the present channel cut out by the Government?

A. My impression — opinion is that the channel they are cutting out now will never amount to anything. Every flood is going to fill it up; every gorge in the river going to fill up in spite of faith.

38 And also JOHN MASON, called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. WINN:

Q. Mr. Mason, where do you live?

A. I reside at Duncan's Falls, about three hundred yards east of the lower eastern end of this bridge in question.

Q. How long have you lived there?

A. I have lived in that immediate vicinity since '39.

Q. How long have you been acquainted with the Muskingum river?

A. Since the fall of 1839.

Q. And you have no knowledge of navigation or failure of navigation prior to that year?

A. Only as a matter of history.

Q. You have no personal knowledge?

A. No, sir.

Q. Are you familiar with the commerce that passes over this bridge at Duncan's Falls?

A. I am.

Q. I will ask you to state to what extent commerce is carried on over that bridge and what it connects—what highways, if any.

A. That bridge connects Zanesville and eastern thoroughfare from Duncan's Falls, at Taylorsville, with all that portion of Muskingum county that we might call the southwestern part of that county. The travel on that road has been largely increased within the last three or four years by reason of the location of the Zanesville & Ohio River railroad upon the western bank of the Muskingum river, which makes travel dangerous for men and horses.

Q. Prior to that time, say from the time the bridge was built down to the time of the building of the railroad, state then to what extent commerce was carried on over this bridge.

A. There was a very large increase, perhaps 300 per cent., over

and above what had been prior to that time since the building of the Z. & O. railroad; it has been increased all of a hundred per cent.

Q. If I understand you, commerce prior to the building
39 of the railroad increased about 300 per cent. over the bridge?

A. Yes, sir; prior to that, crossing by a rickety ferry-boat or in lower stages of the water by fording, the travel was very small. There was a very large increase after the building of the bridge.

Q. How did the proportion of increase over the bridge and that on the river compare?

A. I don't know that I comprehend your question.

Q. Which was greater, over the river or on the river?

A. Well, there was no commerce on that immediate river there by the means used there at that time.

Q. How did the river and the public way compare in commerce and travel?

A. By reason of the bridge being built there and people having access to it over a good thoroughfare had increased it three hundred per cent.

Q. Which was the greater, that which passed over the river or on the river by means of the side-cut canal?

A. So far as commerce carried on by river, there was none; the commerce was through that canal by steamers.

Q. Well, take the commerce carried through the canal. Now, then, which was greater, commerce carried on up and down the river by the canal or commerce over the river by the bridge?

A. Oh, that which was carried over the bridge was a local commerce. That which was carried by the river was the commerce of the world, so to speak.

Q. Which was greater?

A. That by the steamers; there was no comparison.

Q. How as to travel up and down the river?

A. Our boats were generally running with large passenger lists.

Q. How as to the travel of the people?

A. Well, that would be only a matter of opinion.

Q. That is what we want, your opinion.

A. That is a question of some difficulty. I was and have been familiar with boats and boating capacities and work doing
40 there for years, and can only say there was a large increase of travel over that river, over the former methods of crossing that river, and these boats made their trade in the passenger line of considerable magnitude.

Q. The building of the bridge increased the travel on the river?

A. No, sir; I don't say so.

Q. What did you say, then?

A. I said that the travel over that river and its relation to Zanesville as a business point was simply a local traffic; that on steamers was traffic that connected with various points on the Muskingum river.

Q. Which was greater, Mr. Mason, the travel over the river or on the river?

A. Now, do you mean by that which is the most important?

Q. Yes, sir.

A. That on the river, as a matter of course.

Q. How large a place is Taylorsville, Mr. Mason?

A. It is about five hundred inhabitants.

Q. How large is Duncan's Falls?

A. About 250 to 300.

No cross-examination.

41 And also J. F. BURGESS, called on behalf of defendants, being first duly sworn, testified as follows:

Examined by Mr. SOUTHARD:

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. A member of the board of commissioners?

A. Yes, sir.

Q. Can you state when the notice was served upon your board by the Government to remove the obstruction claimed to be caused by the bridge at Taylorsville?

A. I can't just give the date. It was some time in March.

Q. You were a member of the board at that time?

A. Yes, sir.

Q. You may state whether there were any funds in the treasury of the county available for the making of the improvement or changes required by the Government.

A. At that time there was no fund could be applied; no, sir.

Q. Were there any funds that could have been made available except by legislation?

A. I think not.

Q. Have you any doubt?

A. No; there was none.

Q. Are you able to state approximately the cost of this change required by the General Government in this bridge?

A. The probable cost, I should think, would be in the neighborhood of thirty thousand dollars.

Q. What was the earliest date under any levy that your board could make—what was the earliest date in which funds could be realized for bridge purposes—say at the date of the service of the notice in March?

A. There couldn't have been any made for that purpose without a special act of the legislature.

Q. Under a bridge levy in March, when would the levy be available?

A. Be available next March. We couldn't make a levy until next March.

Cross-examination.

By Mr. HERRON:

42 Q. How long have you been a member of the board of commissioners?

A. Two years the first of next January.

Q. When was that notice—the first notice—served on the county commissioners in reference to this change—the first notice to remove the obstruction?

A. I think in March.

Q. Didn't they notify you as early as December?

A. I don't remember of any.

Q. Didn't you give your refusal in the month of December to do anything?

A. I don't remember just when it was.

Q. When did you refuse to do it? Did you make this question of want of funds any reason for refusing?

A. I don't know that we did.

Q. Up to this point did you take any steps at any time to raise money for this purpose?

A. I think it was done.

Q. Well?

A. Our members of legislature were talked to in that matter.

Q. Did you get any authority?

A. It was too late, to near the end of the session, and nothing could be done.

Q. When was that?

A. The last of March, '91.

Q. And that was the only move?

A. Yes, sir.

Q. Had not you- board control of a fund for building bridges?

A. Not that kind of bridges.

Q. You have a bridge fund?

A. Yes; we have a bridge fund.

Q. A general bridge fund?

A. Yes, sir; but we hadn't any at that time.

Q. What time did you say you became a county commissioner?

A. Two years the first Monday in next January; in January, 1890.

Q. Wasn't a notice served in January, 1890, in regard to this obstruction?

A. There might have been a communication of some kind.

Q. Was not a regular notice served?

A. I don't remember of any.

(Objection by defendants.)

43 Q. Now, Mr. Burgess, you say this improvement, you think, would cost in the neighborhood of thirty thousand dollars?

A. I should think it would.

Q. Have you ever examined the plans submitted?

A. Yes, sir.
Q. Did you have any estimates made?
A. No.
Q. Did you refer it to the engineer for estimates?
A. No.
Q. Take any action upon them?
A. No, sir.
Q. What is your business?
A. Lumberman.
Q. Have you built any bridges?
A. Only since I have been a commissioner. What I base my judgment on is experience with other bridges we have been building.

And thereupon defendants rested.

44 And thereupon the complainant, further to maintain the issue on on its part, called in rebuttal C. E. GILLETTE, who testified as follows:

Examined by Mr. HERRON:

Q. I will ask you when you had your first communication with the county commissioners in reference to this matter.

(Testimony objected to by counsel for defendants; admitted subject to exception.)

A. I don't remember the date. There is a copy of it in the papers you have there, sir.
Q. Just look at that letter, dated January 2, 1890 (handing witness letter). Was that sent to the commissioners?
A. Yes, sir; this was served.
Q. Have you examined that plan (Exhibit "B")?
A. Yes, sir.
Q. Have you had any experience in carrying into practical operation plans of that kind?
A. No, sir.
Q. Are you able to make an estimate of the cost of the change of that bridge?
A. I could make a very close estimate of the masonry and get an estimate of the bridge.
Q. Are you able to give an estimate now?
A. Yes, sir.
Q. Have you made estimates of the cost of work of that kind?
A. I have on masonry.
Q. Have you on the iron substructure?
A. No, sir; never in detail.
Q. What would be the cost of the masonry?
A. I would have *it* figure it. The masonry would cost five or six dollars per square yard—I should say $3,300 for the masonry. It would be a little difficult to build under the bridge. If you keep the present bridge there as it is until you built the pier——

(Objection by counsel for defendants. Testimony admitted subject to exception.)

Q. What, in the best of your judgment, would be the cost
45 of making the change according to the plans and specifications?

A. The change would require a drawbridge which would be as good as the present drawbridge. I think an iron bridge of that kind could be built. I think ten thousand dollars ought to build a new iron bridge.

Q. Equal to what is there?

A. Better.

Cross-examination.

By Mr. SOUTHARD:

Q. Then, in your estimate, Lieutenant, have you taken into account the expense of cofferdams?

A. No.

Q. In making this estimate you have not had in mind the plan of bridge and superstructure required by the General Government of the board of commissioners, have you?

A. I have had in view the plans as drawn on the blue print.

Q. You have given your estimate based upon what the Government, as you understand it, is requiring of the board of commissioners?

A. Yes, sir; the Government don't require any particular kind of a bridge.

Q. You are putting an estimate upon some structure as good as the one already there?

A. Yes, sir.

Q. And not upon what a new structure, built according to modern engineering, would cost?

A. I would say as good as the county put in at Brush creek recently; it is a much shorter span.

Q. That, you think, would be about ten or twelve thousand dollars?

A. Yes, sir; a very rough estimate.

(By the COURT:)

Q. Do you include the cost of taking down the present structure?

A. That could be taken down for nothing. A great many men would take it down for nothing for it.

Redirect examination.

By Mr. HERRON:

Q. Has there been a similar bridge built below there?

A. In Morgan county. In Washington county, at Beverly, there

was a bridge built by the commissioners of Washington
46 county under the same change. The old bridge at Waterford is longer in draw-span; being in the open river, a longer draw is required than immediately below the lock. That bridge has a draw of 75 feet in the clear.

Q. Do you know what that bridge cost?

A. I don't. That was built by the commissioners of Washington county, without any legislation that I know of.

Recross-examination.

By Mr. SOUTHARD:

Q. You spoke of having the Brush Creek bridge in mind in giving your estimate?

A. No, sir; I spoke of the quality of the bridge. My estimate was that you could make as good a drawbridge as the one as Brush creek.

Q. Don't you personally know, Lieutenant, that the superstructure of that bridge itself cost over ten thousand dollars at that point?

A. I don't know. The cost of a bridge increases with the increase of the span. That bridge is 80 feet in the clear; this span is only a little over sixty. It makes a great difference.

By Mr. WINN:

Q. The notice that you referred to, Mr. Gillette, was not that a notice to remove this bridge—was it served in January?

A. I can't remember the details; but, as my memory serves me, the commissioners were regularly notified by notice of the Secretary of War exactly similar to that.

And thereupon complainant rested in rebuttal.

It is stipulated that all correspondence between the Government and parties defendant is considered in evidence and may be referred to by either party upon motion for a new trial.

And the foregoing is all the evidence offered by either party on the trial of this cause.

And thereupon the court charged the jury &, among other things, charged that Congress had the constitutional power
47 to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply by the persons owning and controlling any such bridge as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, after due notice and otherwise full compliance with the act of Congress in that behalf, lawfully subjected thereto by prosecution for a misdemeanor, as provided by the act of Congress; to all of which part of said charge defendants at the time then and there excepted.

And thereupon the jury retired and returned, after due deliberation, a verdict of guilty, as appears of record herein.

And thereupon the defendants duly filed their motion for a new

trial, which was argued by counsel and submitted to the court, as also appears of record; which motion was likewise overruled at this the June term, 1897, of this court; to which overruling of said motion defendants likewise excepted, as appears of record.

And thereupon judgment was entered against said defendants and sentence duly passed upon them; to which defendants duly excepted. And now come the defendants and present this their bill of exceptions to the court; which, being examined by the court and found to be correct, is this 24 day of November, A. D. 1897, & at the June term of this court, allowed, signed, sealed, and ordered to be made a part of the record herein.

GEORGE R. SAGE, [SEAL.]
U. S. District Judge, S. D. O., Sitting in and Holding the U. S. Circuit Court, S, D. O.

48 EXHIBIT A.

U. S. engineer office, custom-house.

CINCINNATI, O., *December* 19, 1890.

The commissioners of Muskingum county, O., Zanesville, Ohio.

GENTLEMEN: I have the honor to call your attention to the fact that your bridge across the Muskingum river between Taylorsville and Duncan's Falls, Ohio, has been reported by this office to the Secretary of War as an obstruction to navigation, the object being to secure an alteration of said bridge under the provisions of sections 4 and 5 of the act of Congress approved Sept. 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

This bridge is considered an obstruction to navigation by reason of the fact that it has no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of said bridge at Taylorsville, Ohio.

It is the purpose of this letter to afford you an opportunity to meet the complainant and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as you may deem pertinent. If you desire to avail yourselves of this opportunity you are requested to do so at the U. S. engineer office in Zanesville, Ohio, at 10 a. m. on Tuesday, the 6 day of January, 1890, in order to enable me to make the report on the subject that has been called for. Should you not wish to be present, I shall be pleased to receive, in writing, such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day.

I send you herewith an extract from the act of Congress referred to herein, inviting your attention to the sections named.

49 Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
Lieut. Col. of Engineers.

1 inclosure. Through Lieut. C. E. Gillette, corps of engineers.

50 "D."

U. S. engineer office, custom-house.

CINCINNATI, O., *January* 8, 1891.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: Referring to my letters of Dec. 19, 1890, in regard to the obstruction to navigation by bridges of Muskingum county at the foot of Main street, in Zanesville, and between Taylorsville and Duncan's Falls, and to your letters of reply, dated Dec. 23, I have to inform you that the date upon which you will have an opportunity to be heard in the matter of said bridges has been postponed to Tuesday, the 3rd day of February, 1891. The hearing will be given at the U. S. engineer office in Zanesville at 10 a. m. on the date named.

Respectfully, your obedient servant,

WM. E. MERRILL,
Lieut. Col. of Engineers.

Through Lieut. C. E. Gillette, corps of engineers.

51 Commissioner's office, Muskingum county.

ZANESVILLE, O., *Dec.* 23, 1890.

Wm. E. Merrill, lieut. col. of engineers, Cincinnati, Ohio.

DEAR SIR: Replying to your letter of the 19th inst. in relation to bridge across the Muskingum river between Duncan's Falls and Taylorsville, would state that, as sufficient legal advice has not yet been obtained, the board desires that it be allowed till February 1, 1891, to submit to you a proposition, or report what steps it will take, if any, to remove the obstruction to navigation at said bridge.

By order of county commissioners:

J. A. KNIGHT,
Auditor and Clerk to Commissioners.

52 Commissioner's office, Muskingum county.

ZANESVILLE, O., *February* 3, 1891.

To the Hon. Redfield Proctor, Secretary of War, Washington, D. C.

SIR: Replying to your complaint of December 19, 1890, in reference to the Taylorsville bridge, we have to answer that upon investigation of the matter we find that prior to the time the United States Government took charge of the Muskingum river that by authority of the General Assembly of the State of Ohio a dam, locks, and canal were constructed at Taylorsville, and also prior to the construction of the bridge in question, which provided for navigation, and that the commissioners of this county, by authority granted by the General Assembly of Ohio and upon plans approved by the board of public works of Ohio, constructed said bridge and also the drawbridge across the canal at Taylorsville, which was all done before the Muskingum improvement was transferred by the

State to the United States Government. We have also submitted your complaint to the prosecuting attorney of this county for his opinion, whose opinion is that if the United States Government desires to improve or change the line of navigation of said river, and any of the bridges built by the commissioners by authority of the General Assembly of the State of Ohio and upon plans approved by the State while the State had control of said river, is an obstruction to navigation upon said changed or improved navigation, that the United States Government must make such change and be at the expense of the same. Therefore we think we are not called upon to make any change in the bridge referred to in your complaint or to take any steps for the removal of the obstruction complained of by the United States Government.

53 Very respectfully,

F. M. RIDER,
J. F. BURGESS,
L. M. RUTLEDGE,
County Commissioners.

54 "An act to authorize county commissioners to cause bridges to be constructed on certain public highways in incorporated villages.

"SEC. 1. Be it enacted by the General Assembly of the State of Ohio, That the county commissioners of the several counties in this State shall be authorized and required to cause to be constructed and kept in repair, in the manner prescribed by law, all necessary bridges in incorporated villages and all cities not having the right to demand and receive any portion of the bridge fund levied upon property within such cities in their respective counties, on all State and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through any such incorporated village or city."

(Passed March 30, 1872.)

55 SEPTEMBER 2, 1874.

Ordered that the board does hereby approve of the plan of the bridge (a duplicate of which is retained in this office) across the Muskingum river, at Taylorsville, and that the acting commissioner on division No. 2 (Mr. Hosmer) be directed to indorse this approval thereon.

Vol. 8, General Records, B. P. W., p. 222.

MAY 6, 1884.

Ordered that the commissioners of Muskingum county be, and they are hereby, authorized to construct and maintain a draw or swing bridge across the canal at Taylorsville, on the Muskingum improvement. Said bridge is to be located near the guard-lock and on an alignment with the county bridge as located across the Muskingum river, and to be built in accordance with plans filed in the office of the board of public works and under the direction of the chief engineer or assistant engineer or superintendent in charge o

that division of the public works, and said county will be held liable for any damage that may be caused by neglect to properly maintain said bridge.

Vol. 9, General Records, B. P. W., p. 213.

Extract from Deed from State of Ohio to the United States, Conveying the Muskingum River Improvement.

Know all men by these presents, that whereas, on the fourteenth day of May, A. D. 1886, a joint resolution was passed by the General Assembly of the State of Ohio, wherein, after referring to the paragraph contained in H. R. bill No. 7480, then under deliberation in the Congress of the United States, providing an appropriation for "the improvement of the Muskingum river, Ohio, between Zanesville and the mouth of the river," and also providing for the acceptance by the United States from the State of Ohio of the said improvement, and all the property, rights, etc., appertaining
56 thereto, it was by said General Assembly resolved "that upon the passage of the act aforesaid (meaning said H. R. bill No. 7480) by the Congress of the United States and its approval by the President, the State of Ohio hereby consents to all of the provisions in said act named, and the board of public works is hereby directed to transfer to the proper officers of the United States all the property, money, rights and franchises in said act named, upon the fifteenth day of July, A. D. 1886, or so soon thereafter as may be demanded by the United States;" and whereas the said H. R. bill No. 7480, with the provisions therein, to which reference is made in said joint resolution, has been passed by Congress and approved by the President and so has become a statute of the United States known as the river and harbor act of August 5, 1886, chap. 929; and whereas demand has been made by the United States through its proper officers for the transfer of the hereinafter-described property agreeable to the provisions of said joint resolution; and whereas at a meeting of the board of public works of the State of Ohio, held on the 11th day of January, A. D. 1887, at Columbus, Ohio, it was by said board resolved "that in the exercise of the power conferred upon the board of public works by the joint resolution of the General Assembly of Ohio, passed May 14, 1886, the president of this board be, and he is hereby directed in its name to execute and deliver a deed transferring to the United States all of the property, together with the rights and franchises thereto belonging, now owned, held and enjoyed by the State of Ohio in and to the Muskingum River improvement in said joint resolution mentioned or referred to:" Now, therefore, the board of public works of the State of Ohio, in consideration of the premises, and by virtue of the power conferred upon it as above, doth hereby transfer, grant and convey to the United States of America forever the following-described real property:

* * * * * * *

And also such other real property whatsoever as the State
57 of Ohio may now be seized or embraced in and appertaining to that portion of the property thereof, known as the Mus-

kingum River improvement mentioned in said H. R. bill No. 7480, hereby intending to transfer to the United States of America all the lands and tenements, with the rights and appurtenances thereto, now belonging to the State of Ohio and heretofore occupied and used for canal and other purposes, and known as the said Muskingum River improvement.

In witness whereof, the president of the said board of public works, hath, by virtue of the authority in him vested, hereunto signed its name and affixed its seal, this thirty-first day of January A. D. 1887.

[SEAL.] THE BOARD OF PUBLIC WORKS
OF THE STATE OF OHIO,
(Signed) By JOHN P. MARTIN, *President.*

58 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *Oct.* 16, 1889.

Lieutenant C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: In order to begin proceedings against the bridge at Duncan's Falls, it is necessary to have a map that will show the relations between the new lock and the bridge. Please forward such a map at your earliest convenience.

Your obedient servant, WM. E MERRILL,
Lt. Col. of Engineers.

(Copy.)

59 U. S. engineer office, custom-house.

CINCINNATI, O., *Oct.* 28, 1889.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: You will please notify the commissioners of Muskingum county, Ohio, that the construction of the new lock at Taylorsville has made it necessary to place a draw in their Taylorsville bridge, just below the lock, and ask them if they are willing to construct this draw within a reasonable time.

I think there is no doubt as to the authority of the Government to compel the erection of the draw in question, and therefore I hope that the commissioners will accept the situation frankly, and not give us the annoyance and the county the expense of striving against the inevitable.

Please see the commissioners personally and find out their views in the matter. I am anxious to save them as well as myself the bother of an appeal to the authorities, and if they will promise to have the draw inserted next summer, I will take no official steps in the matter. It is necessary, however, that I should have their decision before long.

Your obedient servant, WM. E. MERRILL,
Lt. Col. of Engineers.

(Copy.)

60 United States engineer office.

ZANESVILLE, O., *Nov.* 22, 1889.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith tracing showing the Taylorsville bridge, with the correct location of new lock No. 9. I have communicated verbally with the commissioners, but have not yet reached any satisfactory solution of the question of altering the bridge, shutting off the canal, etc.

Very respectfully, CASSIUS C. GILLETTE,
1st Lieut. of Engineers.

(Copy.)
(Inclosure in separate package.)

61 United States engineers' office.

ZANESVILLE, OHIO, *January* 6, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Referring to the matter of the draw in the Taylorsville bridge below new lock No. 9, the county commissioners, without expressing an opinion as to the legal merits of the case, decline to make any alterations in the Taylorsville bridge without they are compelled to do so. They give as a reason for this that they wish to protect themselves against criticism from the tax-payers. If ordered to alter the bridge, they propose to employ legal talent toward resisting it.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Eng'rs.

(Copy.)

62 U. S. engineer office, custom-house.

CINCINNATI, O., *January* 22, 1890.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: Upon the report of this office that the Muskingum County bridge across the Muskingum river, between Taylorsville and Duncan's Falls, Ohio, will be an obstruction to navigation upon the completion of the new lock at Taylorsville, now in process of construction by the United States, from the fact that it is not provided with a drawbridge over the channel below the lock, I have been directed by the Chief of Engineers to communicate with you with a view of securing an alteration of said bridge under the provision of the 9th section of the act of Congress of Aug. 11, 1888, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

It is the object of this letter to afford you an opportunity to submit such statements, propositions, and evidence bearing upon the matter as you may deem pertinent. If you desire to do this, you are requested to do so on the 4th day of February next, at 12 m., at the U. S. engineer office in Zanesville, O., in order to enable this

office to make the report upon the subject which has been called for. Should you not wish to be present I shall be pleased to receive, in writing, such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day. Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
Lt. Col. of Engineers.

Through Lieut. C. E. Gillette, corps of engineers.

(Copy.)

63 U. S. engineer office.

ZANESVILLE, O., *January* 24, 1890.

The commissioners of Muskingum county, Ohio, Zanesville, Ohio.

GENTLEMEN: I have to transmit herewith a letter from Colonel Merrill, dated January 22, 1890, concerning the Taylorsville and Duncan's Falls bridge.

CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

(Copy.)

64 Auditor's office, Muskingum county.

ZANESVILLE, O., *January 24th*, 1890.

Lieut. C. E. Gillette, U. S. engineer's office, Zanesville, Ohio.

DEAR SIR: Your communication addressed to the commissioners of this county in regard to obstruction to navigation at Taylorsville is rec'd, and in reply I am instructed to say to you that they will appear before you at your office on the day named, viz., Feb. 4, 1890.

Very respectfully, J. A. KNIGHT,
Auditor & Clerk to County Commissioners.

(Copy.)

65 United States engineer office.

ZANESVILLE, O., *Feb.* 1, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, O.

SIR: The map of the Taylorsville and Duncan's Falls bridge is in your office, our duplicate not being yet prepared for want of time. As it will probably be wanted next Tuesday, I would suggest that your copy be returned temporarily to this office. If this is impracticable for any reason, please telegraph me on Monday and I will have another copy ready.

The masonry of new lock No. 9 is completed, and Tuesday afternoon would be a good time to inspect it, if the business with the commissioners is completed by that time, or it might be well to visit the ground with one or more of the commissioners.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

(Copy.)

66 U. S. engineer office, custom-house.

CINCINNATI, O., *February* 3, 1890.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: As requested in yours of the 1st inst., I send herewith the tracing showing the Taylorsville and Duncan's Falls bridge.

As the commissioners of Muskingum county failed to answer my letter, although particularly requested to do so, I have made no arrangements to go to Zanesville and am not certain at this writing that I can get there. If I do not put in an appearance, please act for me and submit a report, returning this tracing and inclosing whatever documents the commissioners may desire to send.

Your obedient servant, WM. E. MERRILL,
Lieut. Col. of Engineers.

(Copy.)
(1 inclosure. Incl. 1 of 340, 1890.)

67 Commissioners' office, Muskingum county.

ZANESVILLE, O., *February* 4, 1890.

W. E. Merrill, lieut. col. of engineers.

DEAR SIR: Replying to yours of the 22nd ult., would state that the undersigned commissioners decline to take any steps towards placing a draw in the Taylorsville bridge on the grounds that the bridge was built under proper authority and was not an obstruction to navigation, as the same was provided for by a draw-span over the canal. The abandonment of the canal and requirement of a channel through what is now a continuous span was the act of the United States authorities, and said commissioners insist that the Government should bear the expense of making the change in the bridge.

Respectfully,
C. W. M'CUTCHEON,
FRANCIS M. RIDER,
J. F. BURGESS,
Commissioners of Muskingum County, Ohio.

(Copy.)

68 ZANESVILLE, O., *Feb.* 7, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, O.

SIR: I have to transmit herewith a letter from the commissioners of Muskingum county concerning the Taylorsville bridge. It contains the subject-matter of their views at the meeting on February 4, which they attended.

The reason of their not replying to your letter was the fact that they thought they had fulfilled the requirements when they sent a response addressed to me, and I rather carelessly assumed that they would send a letter to you by mail. However, the material they had to present was not such as would have required a meeting at all.

Very respectfully, CASSIUS E. GILLETTE,
1st. Lieut. of Eng'rs.

(Copy.)
1 inclosure.

69 U. S. engineer office, custom-house.

CINCINNATI, O., *February* 8, 1890.

Lieut. Cassius E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: I have to acknowledge the receipt of the letter from the commissioners of Muskingum county, Ohio, declining to take any steps towards placing a draw in the Taylorsville bridge.

They take the ground that the bridge as it stands is no obstruction to navigation through the old channel via the canal. I wish therefore that you would report on the relations to navigation of the existing drawbridge. It is my impression that it is an obstruction, and would have required alteration had the canal been maintained.

Your obedient servant, WM. E. MERRILL,
Lt. Col. of Engineers.

(Copy.)

70 United States engineers' office.

ZANESVILLE, O., *February* 14, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Replying to your letter of February 8 concerning the Taylorsville drawbridge, I have to report that I examined our office records, the original drawing of the bridge, and the bridge itself, and I find that no complaint could have been well entered against it as an obstruction to navigation through the canal. The span is over 40 feet at low-water mark and the foundations are 10 feet below low water, the masonry nearly new and substantially constructed.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

(Copy.)

71 United States engineer office.

ZANESVILLE, O., *February* 15, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to return herewith map showing location of new lock No. 9 and proposed draw of bridge below lock, at Taylorsville Ohio.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

1 inclosure.
Copy.

72 Auditor's office, Muskingum county.

ZANESVILLE, O., *August* 9, 1890.

Cassius E. Gillette, 1st lieut. of engineers.

DEAR SIR: Acting under suggestion in your communication of the 24th ult., we wrote Congressman Owens of this district to confer with the Secretary of War and determine, if possible, what will be

the legal outcome in case of litigation between the U. S. authorities and county commissioners with reference to the Taylorsville draw.

By order of commissioners:

J. A. KNIGHT, *Auditor.*

(Copy.)

73 United States engineer office.

ZANESVILLE, O., *August* 11, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

DEAR SIR: I enclose copy of lettter received from the commissioners of Muskingum county in reference to the Taylorsville drawbridge.

I will notify you of the result of the conference mentioned as soon as I learn it.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Eng'rs.*

(Copy.)

74 Commissioners' office, Muskingum county.

ZANESVILLE, O., *August* 20, 1890.

Hon. Redfield Proctor, Secretary of War, Washington, D. C.

SIR: Your notice of date August 8, 1890, relative to alteration of bridge at Taylorsville, on the Muskingum river, in this, Muskingum, county, is at hand and contents carefully noted. Upon due consideration, the board of county commissioners have decided that they are not responsible for the obstruction named, and respectfully decline to take any action in the premises without a decision of the proper court.

Very resp'y, C. W. M'CUTCHEON,
F. M. RIDER,
J. F. BURGESS,
County Commissioners.

(Copy.)

75 United States engineer office.

ZANESVILLE, O., *August* 23, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith a letter to the Secretary of War from the commissioners of Muskingum county, replying to his order of August 8, 1890, requiring alterations of the bridge at Taylorsville. Since this bridge will be an obstruction to navigation until it is open, would recommend that steps be taken to bring it into court as soon as possible.

Very respectfully, CASSIUS E. GILLETTE,
1*st Lieut. of Engineers.*

(Copy.)
1 inclosure.

76 U. S. engineer office, custom-house.

CINCINNATI, O., *Dec.* 8, 1890.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: To enable this office to reply to a call from the office of the Chief of Engineers, I have to request information as to the steps thus far taken by the parties in interest looking to a compliance with the orders of the Secretary of War as to modification of bridges over the Muskingum river at the following localities:

1. Taylorsville & Duncan's Falls.

Your obedient servant,

WM. E. MERRILL,
Lieut. Col. of Engineers.

(Copy.)

77 Muskingum River improvement, U. S. engineer office.

ZANESVILLE, O., *December* 9, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: Replying to your letter of December 8, about bridges at Taylorsville and Marietta, I have to inform you that the county commissioners have done nothing toward altering the Taylorsville bridge since their last interview with you.

There is no data on file in this office concerning the Marietta & Harmar Railroad bridge. I believe, however, that no steps have been taken to alter it.

Very respectfully,

CASSIUS E. GILLETTE,
1*st Lieut. of Engineers.*

(Copy.)

78 U. S. engineer office, custom-house.

CINCINNATI, O., *December* 19, 1890.

The commissioners of Muskingum county, O., Zanesville, Ohio.

GENTLEMEN: I have the honor to call your attention to the fact that your bridge across the Muskingum river between Taylorsville and Duncan's Falls, Ohio, has been reported by this office to the Secretary of War as an obstruction to navigation, the object being to secure an alteration of said bridge under the provisions of sections 4 and 5 of the act of Congress approved Sept. 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."

This bridge is considered an obstruction to navigation by reason of the fact that it has no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of said bridge at Taylorsville, Ohio.

It is the purpose of this letter to afford you an opportunity to meet the complainant and to submit such statements, propositions, and evidence in reply to said complaint or bearing on the subject as you may deem pertinent. If you desire to avail yourself of this

opportunity, you are requested to do so at the U. S. engineer office in Zanesville, Ohio, at 10 a. m. on Tuesday, the 6th day of January, 1891, in order to enable me to make the report on the subject that has been called for. Should you not wish to be present, I shall be pleased to receive in writing such statements, propositions, or evidence as you may consider responsive to the complaint on or before that day.

I send you herewith an extract from the act of Congress
79 referred to herein, inviting your attention to the sections named.

Please inform me by early mail if you desire a hearing in the matter.

Respectfully, your obedient servant,

WM. E. MERRILL,
Lieut. Col. of Engineers.

1 inclosure through Lieut. C. E. Gillette, corps of engineers.
(Copy.)

80 Commissioners' office, Muskingum county.

ZANESVILLE, O., *Dec.* 23, 1890.

Wm. E. Merrill, lt. col. of engineers, Cincinnati, Ohio.

DEAR SIR: Replying to your letter of the 19th inst., in relation to bridge across the Muskingum river between Duncan's Falls and Taylorsville, would state that as sufficient legal advice has not yet been obtained that the board desires until February 1, 1891, to submit to you a proposition or report what steps it will take, if any, to remove the obstruction to navigation at said bridge.

By order of county commissioners:

J. A. KNIGHT,
Auditor and Clerk to Commissioners.

(Copy.)

81 U. S. engineer office.

ZANESVILLE, O., *December* 24, 1890.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to transmit herewith letters from the commissioners of Muskingum county asking that their answers in the matters of the Main Street and Taylorsville bridges be not required before February 1st, 1891.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

2 inclosures.
(Copy.)

82 U. S. engineer office.

ZANESVILLE, O., *February* 3, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I have to inform you that the county commissioners of this county were today given a hearing in the matters of the bridge at

Main street, in Zanesville, and the Taylorsville-Duncan's Falls bridge in accordance with your letters of December 19, 1890. The commissioners stated that they would decline to make the changes required in the bridges and submitted letters suggesting that the matter be referred, on an agreed statement of facts, to the United States court for this district; but, on ascertaining that they had not yet been ordered to make the changes under the act approved September 19, 1890, they withdrew those letters and subsequently submitted two letters, which are inclosed herewith.

I would suggest that a recommendation be sent the Secretary of War that the necessary orders for the alteration of the bridge be sent immediately, and that the time for making the alteration be limited to one month. In order that such limitation should not appear unreasonable, the order should state that the time would be extended at the request of the commissioners, if made before the expiration of the month. The reason of this is that the commissioners will not make the alteration until they are ordered to by the courts, and the sooner the matter is thrown into the courts the better it will be for all parties concerned, since the bridge can be altered best next season under cover of the Government cofferdam. This applies to the bridge at Taylorsville.

The commissioners are anxious to get the matter into the courts as soon as possible, and it was their suggestion that the time for completion be limited. I do not know the time of the session
83 of the courts, but the matter ought to be brought before the present or the next session.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

2 inclosures.

84 U. S. engineer office, custom-house.

CINCINNATI, O., *Feb.* 4, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: The order of the Chief of Engineers requires that I shall specify "the changes that will be required to render navigation through or under the bridge free, easy, and unobstructed." Please therefore submit tracings showing alterations required in bridges at Taylorsville and at foot of Main street, in Zanesville, with special reference to the location and width of draws required.

Your obedient servant, WM. E. MERRILL,
1st Lieut. of Engineers.

(Copy.)

85 U. S. engineer office.

ZANESVILLE, O., *February* 10, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: As directed in your letter of February 4, I have to transmit herewith tracings showing the head of the canal at Zanesville and the head of the canal at Taylorsville, with reference to the location

and width of the draws required in the county bridges at those points.

At Taylorsville I have shown a clear width of 62 feet, which gives only a reasonable entrance to the lock for boats. It allows a pivot pier of reasonable size in the middle of the present span. I have shown the shore line about in its present state at low water, but it will be changed somewhat as the channel is opened.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

2 inclosures in separate packages.

86 WAR DEPARTMENT,
WASHINGTON CITY, *Feb.* 25, 1891.

To the county commissioners of Muskingum county, Ohio:

Take notice that whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum county, Ohio, across the Muskingum river, between Taylorsville and Duncan's Falls, Ohio, is an unreasonable obstruction to the free navigation of the said river (which is one of the navigable waters of the United States), on account of not being provided with a draw-span below the new United States lock No. 9, in said river;

And whereas the following alterations will render navigation through it reasonably free, easy, and unobstructed, to wit, the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown on the map hereto attached;

And whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, Redfield Proctor, Secretary of War, does hereby notify the said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribe- that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
Assistant Secretary of War.

(Copy.)

87 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *March* 21, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: Your letter of the 20th inst., with accompanying letters from the commissioners of Muskingum county, is at hand.

No copies of the orders of the Secretary of War in regard to alterations of bridges at the foot of Main street, in Zanesville, and at Taylorsville, Ohio, are on file in this office.

Your obedient servant, W. E. MERRILL,
Lieut. Col. of Engineers.

(Copy.)

88 U. S. engineer office, custom-house.

CINCINNATI, OHIO, *Oct.* 9, 1891.

Lieut. C. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: Please send me the names of the commissioners of Muskingum county by return mail. These names are desired by the district attorney in connection with proceedings to compel alterations of the Taylorsville bridge.

Your obedient servant, WM. E. MERRILL,
Lieut. Col. of Engineers.

(Copy.)

89 U. S. engineer office.

ZANESVILLE, O., *October* 31, 1891.

Lieut. Col. W. E. Merrill, corps of engineers, Cincinnati, Ohio.

SIR: I am requested by Commissioner Chandler to ask you to inquire of the district attorney what disposition he wishes made of the blue print showing Taylorsville bridge, which was part of the evidence at the hearing this morning.

Very respectfully, CASSIUS E. GILLETTE,
1st Lieut. of Engineers.

(Copy.)

90 U. S. engineer office, custom-house.

CINCINNATI, O., *Nov.* 2, 1891.

Lieut. W. E. Gillette, corps of engineers, Zanesville, Ohio.

SIR: In reply to your letter of the 31st ult. I have to state that the district attorney brought back with him the only blue print of which he has any knowledge, but he adds: "However, if the paper in question is not claimed by the defendants, the commissioner may remit it to this office or attach it to the transcript which he will forward to the U. S. clerk, District of Columbus."

Your obedient servant, WM. E. MERRILL,
Lieut. Col. of Engineers.

(Copy.)

91 UNITED STATES OF AMERICA:

WAR DEPARTMENT,
WASHINGTON CITY, *October* 15, 1891.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the office of the Chief of Engineers, U. S. Army, that the annexed are authenticated copies of papers on file in that office.

THOS. LINCOLN CASEY,
Brig. Gen., Chief of Engineers.

Be it known that Thos. Lincoln Casey, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on this 15th day of October, one thousand eight hundred and ninety-one.

[SEAL.]

L. A. GRANT,
Acting Secretary of War.

92 WAR DEPARTMENT,
WASHINGTON CITY, *February* 25, 1891.

To the County Commissioners of Muskingum County, Ohio:

Take notice that—

Whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum county, Ohio, across the Muskingum river between Taylorsville and Duncan's Falls, is an unreasonable obstruction to the free navigation of the said river (which is one of the navigable waters of the United States), on account of not being provided with a draw-span below the new United States lock No. 9 in said river;

And whereas the following alteration will render navigation through it reasonable free, easy, and unobstructed, to wit, the construction of a draw-span in said bridge below the said lock in accordance with the plan shown on the map hereto attached;

And whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of the Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890, Redfield Proctor, Secretary of War, does hereby notify the said county commissioners of Muskingum county, Ohio, to alter the said bridge as described above, and prescribe- that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
Assistant Secretary of War.

(Here follows map marked p. 93*a*.)

93 And afterwards, to wit, on the 14th day of May, A. D. 1892, there was filed in the clerk's office of the court aforesaid a certain opinion of Judge Sage in this cause; which said opinion is clothed in the words and figures following, to wit:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Opinion of Judge Sage.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES
vs.
FRANK M. RIDER, JOHN F. BURGESS, SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio.

This case is before the court on motion for new trial. The defendants are prosecuted under an information founded upon the fourth and fifth sections of the river and harbor act, approved September 19, 1890. The charges are, in short, that on the 15th day of October, 1891, the defendants were the County Commissioners of Muskingum County, Ohio, and as such empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals on all State and county roads, and then and there had control of the bridge across the Muskingum river, between Taylorsville and Duncan's Falls, and the Secretary of War of the United States having good reason to believe that said bridge was an unreasonable obstruction to the navigation of said river—a navigable stream over which the United States has jurisdiction—on the 19th of December, 1890, gave written notice to the defendants that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford defendants a reasonable opportunity to be heard and give evidence in regard to said complaint the sixth of January, 1891, was named and a place fixed for that purpose; that the time was extended to the third of February, 1891, and that on the 25 of February, 1891, the Secretary gave written notice to the defendants that said bridge was an
94 unreasonable obstruction to the free navigation of said river, for the reason above stated, and required the construction of a draw-span therein in accordance with plans shown in a map attached to said notice and served upon the defendants. Said notice prescribed that said draw-span should be made and completed within a reasonable time, to wit, on or before the 30th of September, 1891, and that personal service of said notice was made on the 3rd of March, 1891; that afterwards the defendants, on, to wit, the 15th day of October, 1891, after receiving said notice, did unlawfully fail and refuse to comply with the order of the Secretary and to make the alterations aforesaid, contrary to the form of sections four and five of the act above referred to. Those sections are as follows:

SEC. 4. That section nine of the river and harbor act, of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to reas as follows:

That whenever the Secretary of War shall have good reason to

believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account if insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that
95 the criminal proceedings mentioned in the succeeding section may be taken.

SEC. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporations, or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him wilfully fail or refuse to remove the same, or to comply with the *pawful* order of the Secretary of War in the premises, such persons, corporations or associations shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every — such persons, corporations or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation or association so offending to the penalties above prescribed.

Upon the trial, the evidence being in, a *pro forma* verdict of guilty was taken by consent, with the understanding that the questions of law involved should be presented and considered on motion for new trial. There are two questions, as follows:

1. Was the notice to the defendants reasonable? The charges of the information in regard to the notice were established by the evidence and are not disputed. It has been held that where the facts are clear, what is reasonable notice or reasonable time is always a question exclusively for the court. Toland *v.* Sprague, 12 Peters, 336; Wiggins *v.* Burkham, 10 Wallace, 132. It appears from the evidence that at the time of the service of said notice the defendants had no funds with which to make the required change, and that under the statute of Ohio they as commissioners could only make levies for bridge purposes at their March or June session in each year, one-half of which would be collectible not be-
96 fore the 20th of December of such year and the other half not before the 20th of June of the year following. It also appears from the evidence that the defendants applied for legisla-

tion authorizing them to raise the funds with which to make the change required, and that their application failed, and the defendants introduced evidence tending to prove that the cost of the required change will exceed the sum of $10,000, which, however, is denied by witnesses for the Government. The defendants, under the statutes of Ohio, cannot expend in constructing, altering, or repairing any bridge a sum in excess of $10,000 without special authority from the legislature or without submitting the same to a vote of the people of the county at some general election, and there was no general election after the service of notice excepting the spring election on the first Monday of April and the State election on the first Tuesday after the first Monday of November. The first of these dates was too early after the notice and the last was after the limit prescribed by the notice. The defendants had no authority in the matter excepting as county commissioners. They had no bridge fund to draw upon and no authority of law to incur any obligation excepting upon their individual responsibility. It would be manifestly unreasonable to expect them to proceed without the authority of local law and without money, upon their own responsibility, to incur the expense involved in making the required changes, whether the cost would have been less or more than $10,000. The notice was not reasonable, and therefore, if upon no other ground, the verdict must be set aside.

2. The main question, and that which goes to the root of the matter, is whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the act. In accordance with its terms, whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation, he is to give notice to the parties owning or controlling the same,
97 after first giving them reasonable opportunity to be heard, to make such alterations as he may specify, and upon their failure or refusal to make the same within a reasonable time, they are to be deemed guilty of a misdemeanor, and the Secretary of War may direct the institution of criminal proceedings. The power of the Secretary depends upon his having adjudged that the bridge is an obstruction, and his adjudication is made final and conclusive. This is judicial power. The question is one of fact or a mixed question of law & fact, and it cannot be determined by a court without a jury unless the defendant consent. It was held in Grant *v.* Raymond, 6 Peters, 242, Chief Justice Marshall announcing the decision, that the Secretary of State of the United States is not an officer in whom, under the Constitution, judicial power can be vested. In that case the Secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any statute authorizing a reissue. The original patent had been granted by the President, signed by him, and countersigned by the Secretary. It was returned to the Patent Office and cancelled, owing to the defective specification on which it was issued, and another patent issued with a corrected specification. The argument in favor of the reissue was that the Department of State had clearly the right to correct an inadvertent or innocent mistake. But the court said

that the question of inadvertance or mistake was a judicial question, which could not be decided by the Secretary of State. It is also true that within a few months after the decision of that case Congress enacted a statute making it lawful for the Secretary of State, upon the surrender of a patent invalid or inoperative by reason of inadvertance, accident, or mistake, as specified in the act, to cause a new patent for the same invention, and for the residue of the term of the original patent, to be issued, the reissued patent to be liable to the same defenses as the original, and that subsequently the authority was vested in
98 the Commissioner of Patents, with whom it remains to this day. But there is this radical difference between the case of a reissued patent and the case now before the court. The patent, original or reissued, is only *prima facie* evidence of an exclusive right in the patentee, and it is open to all defences, inclusing in the case of a reissued patent those involving an investigation into the question whether there was in fact any such inadvertance, accident, or mistake as was requisite to authorize the reissue, while here the Secretary of War finds and decides conclusively and finally whether the bridge is an obstruction, what changes shall be made, and within what time, and the only questions left open to be tried in the criminal prosecution for misdemeanor which he is authorized to set on foot are whether he has made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

In this case the bridge was built about 1874, by the Board of Commissioners of Muskingum County, by virtue of a grant from the State of Ohio under the act of the legislature of March 25, 1870. The Muskingum river is entirely within the State of Ohio. Since 1838, and until the date hereinafter mentioned, it has been under the control of the State through its board of public works, which maintained a system of slack-water navigation until the session of the river and its improvements by the State of Ohio to the Federal Government, March 21, 1887. Since that time the General Government has caused to be constructed, in a dam at the head of rapids above said bridge, on its west side and under the bridge, an artificial channel. It has also raised the locks and dam on the river below, thus raising the level of the water above some four feet. These improvements and changes furnished the occasion alleged for requiring the proposed changes in the bridge.

The right of the State of Ohio to erect or authorize bridges
99 over the river which should not interfere with its navigation is conceded, and that such bridges were lawful structures; but it is urged for the Government that they were built subject to the power of Congress at any time to act upon the subject of the navigation of the river, and to define what structures should be regarded as interfering with that navigation, citing Gilman *v.* Philadelphia, 3 Wall., 731. There is a long series of cases decided by the Supreme Court and cited in U. S. *v.* Keokuk and H. Bridge, 45 Fed. Rep., at page 180, sustaining the general proposition as above stated; but the question to be here decided is whether Congress

could delegate, as it has undertaken to do, its authority in the premises to the Secretary of War. My conclusion is that it could not. The reasons for this conclusion are so well and so fully set forth by Judge Shiras in U. S. *v.* Keokuk and H. Bridge, cited above, that it is sufficient to refer to that case, and to express, as I do, my concurrence in the reasoning and conclusions of the opinion therein.

The verdict against the defendants will be set aside and the judgment of the court will be that sections four and five of the river and harbor act of September 19, 1890, upon which the information is based, are unconstitutional, and that the defendants go hence without day.

GEO. R. SAGE,
U. S. District Judge.

May 14, 1892.

100 And afterwards, to wit, on the 15th day of June, A. D. 1896, there was filed in the clerk's office of said court a certain mandate from the Supreme Court of the United States in this cause; which said mandate is clothed in the words and figures following, to wit:

Mandate.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Whereas lately, in the circuit court of the United States for the southern district of Ohio, before you, in a cause between The United States, plaintiff, and Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, wherein the judges were opposed in opinion on certain points or questions which were certified, under the seal of the said circuit court, to the Supreme Court of the United States for its opinion, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that this certificate be, and the same is hereby, dismissed. Whereupon it is now here ordered and adjudged by this court that it be so certified to the said circuit court, and the same is accordingly hereby certified.

May 18, 1896.

You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of

the United States ought to be had, the said certificate not-
101 withstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

And afterwards, to wit, on the 1 day of June, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry, C. 235.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
versus
FRANK M. RIDER ET AL., Defendants. } No. 211.

Entry Overruling Motion for New a Trial.

This day this cause came on further to be heard upon the motion of the defendants for a new trial, and it appearing to the court that the questions heretofore reserved upon the trial of this cause for hearing and decision by the court, to wit: 1st, Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by S. 4 and S. 5 of the act of Congress of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river; 2nd, Whether the failure to comply by persons owning and controlling the said bridge with said determination of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor; upon which said questions the Honorable William H. Taft, United States circuit judge, and the Honorable George R. Sage, United States district judge in and for the southern district of Ohio, were upon the hearing thereof divided in opinion; and it appearing, further, that by reason of said division the said points of disagreement, as stated
above, were under the direction of said court heretofore, to
102 wit, on the tenth day of November, 1892, certified, under the seal of the court, to the Supreme Court of the United States; and it appearing, further, from the mandate filed herein on the fifteenth day of June, 1896, that the Supreme Court of the United States refused to answer said questions so certified and adjudged that the said certificate of division of opinion, as aforesaid, be dismissed from said court: Now, therefore, in consideration of the premises, there appearing to be in the record of said cause no error at the trial thereof to the prejudice of the defendants, it is considered that the said motion for a new trial be, and the same is hereby, overruled; and thereupon, on motion of the United States attorney for the southern district of Ohio for sentence, it is considered and adjudged that the

defendants, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, be, and they are hereby, sentenced to pay to the United States of America the sum of ten ($10) dollars each and the costs of this prosecution; to all of which findings and judgment and sentence of the court the said defendants, jointly and severally, except.

And afterwards, to wit, on the 24th day of November, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry as to Bill of Exceptions.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, Ohio, Defendants.

This day this cause came on to be heard on the application of the defendants for the allowance and the signing of the bill of exceptions herein, and the court, having carefully examined the same, finds it to be correct, and it is hereby allowed, signed, sealed, and ordered to be made a part of the record herein this twenty-
103 fourth day of November, A. D. 1897.

And afterwards, to wit, on the 24th day of November, A. D. 1897, came the defendants, by their solicitors, and filed in the clerk's office of said court their certain petition for writ of error and assignment of errors; which said petition and assignment are clothed in the words and figures following, to wit:

Petition for Writ of Error; Assignment of Errors.

United States District Court, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and Samuel M. Rutledge, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.
At Law. Petition for Writ of Error.

And now comes Frank M. Rider, John F. Burgess, Samuel M. Rutledge, county commissioners of Muskingum county, in the State of Ohio, plaintiffs in error, and say that on or about the first day of June, 1897, this court entered judgment herein in favor of the defendants in error and against these plaintiffs in error, in which

judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition. Wherefore these plaintiffs in error pray that writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

SIMEON M. WINN &
FRANK H. SOUTHARD,
Att'ys for Plaintiffs in Error.

United States Circuit Court, Southern District of Ohio, Eastern Division.

104 FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. Rutledge, County Commissioners of Muskingum County, Ohio, Plaintiffs in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error. } At Law.

Assignment of Errors.

The plaintiffs in error in this action and in connection with their petition for a writ of error make the following assignments of error, which they aver occurred upon the trial of the cause, to wit: 1st. The court erred in overruling the demurrer filed by plaintiffs in error to the information of defendant in error. 2nd. The court erred in its charge to the jury, as appears of record. 3rd. The court erred in holding that Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the sections 4 and 5 of the act of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of the river. 4th. The court erred in holding that a failure to comply by persons owning and controlling any such bridge with said determination of the Secretary of War can lawfully subject them to a prosecution for misdemeanor. 5th. The court erred in overruling the motion of plaintiffs in error for a new trial. 6th. The court erred in entering judgment in favor of the defendant in error and against the plaintiffs in error.

S. M. WINN &
F. H. SOUTHARD,
Att'ys for Plaintiffs in Error.

And afterwards, to wit, on the 24th day of November, A. D. 1897, an entry was made upon the journal of said court in said cause; which said entry is clothed in the words and figures following, to wit:

Entry.

The Circuit Court of the United States, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,

vs.

105 THE UNITED STATES, Defendant in Error.

This 24th day of November, 1897, came the plaintiff in error, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon the plaintiffs in error giving bond according to law in the sum of $250.00, which shall operate as a supersedeas bond; which said bond is duly presented & approved.

And afterwards, to wit, on the 24th day of November, A. D. 1897, came the plaintiffs in error, by their attorneys, and filed in the clerk's office of said court their certain error bond in this cause; which said error bond is clothed in the words and figures following, to wit:

Error Bond.

The Circuit Court of the United States, Southern District of Ohio, Eastern Division.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, in the State of Ohio, Plaintiffs in Error,

vs.

THE UNITED STATES, Defendant in Error.

Bond on writ of error.

Know all men by these presents that we, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, as principals, and Finley M. Fleming, H. L. Greiner, and F. B. Fell, as sureties, are held and firmly bound unto the United States of America in the full and just sum of $250, to paid to the said the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

106 Whereas lately, at the circuit court of the United States for the southern district of Ohio, eastern division, in a suit pending in said court between The United States, as plaintiff, and the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, in the State of Ohio, defendants, a judgment was rendered against the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, and the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the — day of —— next:

Now, the condition of the obligation is such that if the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make the said plea good, then the above obligation to be void, and *as well* to be and remain in full force and virtue.

Sealed and delivered in the presence of—

[SEAL.]	F. M. RIDER.
[SEAL.]	JOHN F. BURGESS.
[SEAL.]	SAMUEL M. RUTLEDGE.
[SEAL.]	FINLEY M. FLEMING.
[SEAL.]	H. L. GREINER.
[SEAL.]	F. B. FELL.

Approved by—

GEO. R. SAGE,
District Judge.

107 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } ss:

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Columbus, Ohio, this 29th day of November, A. D. 1897.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy.*

108 THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States and Frank M. Rider *et al.*, commissioners of Muskingum Co., Ohio, a manifest error hath happened, to the great damage of the said Frank M. Rider *et al.*, commissioners aforesaid, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of November, 1897, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal United States District Court, Southern Dist. Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

Allowed by—
HON. GEORGE R. SAGE,
U. S. District Judge.

109 [Endorsed:] United States circuit court, southern district of Ohio. No. 211. The United States *vs.* Frank M. Rider *et al.* Writ of error. Filed —— —, 18—. —— ——, clerk.

110 THE UNITED STATES OF AMERICA, *ss*:

To Harlan Cleveland, district attorney for the United States for the southern district of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, are plaintiffs and The United States is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 25th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

GEO. R. SAGE,
U. S. District Judge, S. D. O.

111 [Endorsed:] Marshal's civil docket No. 464. United States circuit court. No. 211. The United States *vs.* Frank M. Rider *et al.*, com'rs of Muskingum Co., O. Citation to defendant in error. Filed —— —, 18—. —— ——, clerk.

UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss*:

Received this writ at Cincinnati, Ohio, on the 26th day of November, 1897, and on the 29th of November, 1897, I executed same by handing personally a true copy hereof, with all the endorsements thereon, to the within-named Harlan Cleveland, district attorney for the United States for the southern district of Ohio, at Cincinnati.

MICHAEL DEVANNEY,
U. S. Marshal, S. D. O.,
By M. H. SPILLON, *Deputy.*

1 mi. writ	$0 06
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Endorsed on cover: Case No. 16,745. S. Ohio C. C. U. S. Term No., 209. Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, commissioners of Muskingum county, Ohio, plaintiffs in error, *vs.* The United States. Filed December 10, 1897.